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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1963**

No. 327

HOWARD ROSS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JESSE CLIMENKO,
*Attorney for Petitioner,*
GALLOP CLIMENKO & GOULD,
360 Lexington Avenue,
New York, New York.

*Of Counsel:*
JESSE CLIMENKO,
MILTON S. GOULD,
SHELDON CAMHY.

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UNITED STATES OF AMERICA,

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Howard Ross prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which was entered in the above-entitled case on July 5, 1963 affirming a judgment of the United States District Court for the Southern District of New York convicting Petitioner of violating the Securities Act of 1933 (17 U.S.C. §§77q and 77x) and sentencing him to imprisonment for one year.

The Opinion of the Court of Appeals for the Second Circuit is unreported as of this date and appears as appendix "A" to this petition. The judgment of conviction of the District Court was upon a jury verdict and no written opinion was given by the District Court in connection therewith.

## Jurisdiction

The judgment of the Court of Appeals was entered on July 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1524 (1) and Rule 22 (2) of the Rules of this Court.

## Questions Presented

This petition presents the following questions of constitutional law and federal criminal procedure:

1. Whether during the pendency of a criminal appeal the District Court may, on motion of the Government, and without affording defendant a hearing on the issue, proceed under Rule 75 (h) of the Federal Rules of Civil Procedure to "correct" the transcript of the trial in accordance with its own recollection of the proceedings by deleting therefrom certain remarks of the prosecuting attorney which had been assigned as prejudicial error by the defendant on appeal.

2. Whether, in a criminal prosecution under the Securities Act of 1933 for fraud with respect to the making of a particular sale of securities, it was proper for the prosecuting attorney under the guise of cross-examination of the defendant to suggest and insinuate to the jury, but without any proof, that the accused had on many previous occasions sold other worthless stocks by making misleading statements to customers and had been associated with other brokerage firms in fraudulent practices. Whether in the instant case such cross-examination deprived petitioner of a fair trial.

3. Whether in the instant case the Court of Appeals deprived petitioner of his right to a fair trial and due process of law by consciously ignoring the clear violations

of the hearsay rule and the best evidence rule which occurred at the trial and holding that petitioner's conviction could be sustained without any direct evidence in the record identifying him as the person who committed the particular criminal acts alleged.

## Statutes Involved

The statutes and rules directly involved herein are Sections 17 and 24 of the Securities Act of 1933 (15 U.S.C. §§77 q(a) and 77 x), Rule 39 of The Federal Rules of Criminal Procedure and Rule 75 of the Federal Rules of Civil Procedure. These are printed in Appendix B to this petition.

## Statement of the Case

Petitioner was convicted of violating Sections 17 and 24 of the Securities Act of 1933 (15 U.S.C. §§77 q(a) 77 x) in that as an employee of Kimball Securities, Inc. he had participated in a scheme or artifice to defraud one William S. Mueller of Amherst, Massachusetts, in connection with the sale of 100 shares of stock of Mark Inc. The specific act with which petitioner was charged under the indictment was the making of a telephone call to Mr. Mueller in late November of 1958 which resulted in the purchase of the stock by Mueller.

The evidence upon which the proof of this charge depended was the following:*

> (a) The testimony of Mr. Mueller who stated that he was "fairly certain" that the voice of the man on the telephone identified himself as "Mr. Ross" (petitioner's name) (3099). Mr. Mueller had previously signed an affidavit stating that the person who telephoned him identified himself as

* References shown are to the pages of the stenographic transcript of the trial filed with this petition or to certain portions thereof printed as appendices hereto.

"Mr. Kimball * * * Joe Kimball" (3114). Prior to making the affidavit, Mr. Mueller had completed a questionnaire for the Securities and Exchange Commission in which he stated that he could not recall the name of the person who telephoned him but believed that his first name was "Joe" (3109). Petitioner's first name is Howard.

(b) A written confirmation of purchase by Kimball Securities, Inc. to Mr. Mueller dated November 26, 1958 and sent to Mr. Mueller through the mail. This showed the purchase of 100 shares of Mark, Inc. for $235 and that the transaction was made through "Salesman 24" (App. E).

(c) The testimony of Mr. Joseph Sussman, the bookkeeper of Kimball Securities, Inc., to the effect that each salesman of Kimball had an identifying number (3228). Mr. Sussman was not asked and never stated whether petitioner had such a number and, if so, what petitioner's number was.

(d) The testimony of Mr. Joseph A. Kelly, an investigator for the Securities and Exchange Commission. Mr. Kelly testified that in January 1959, a month after petitioner had left the employ of Kimball Securities, Inc. (3389) and three years prior to the trial, Kelly visited the Kimball office and asked Mr. Sussman to identify the numbers that the salesmen used (App. D p. 1). According to Mr. Kelly, Mr. Sussman said nothing but "* * * pointed to a list that was on side of the cage, the cashier's cage, and it showed the number of the salesman who was assigned to that particular number on the list." Mr. Kelly testified over objection that he made notes of the names and the numbers on the list which Sussman pointed to and that No. 24 was assigned to Mr. Ross (App. D pp. 1, 2). Neither the list which was shown to Mr. Kelly, nor any copy thereof, nor any similar list was produced in court (App. A pp. 14, 15).

(e) The testimony of Walter A. Gairing, of Wadsworth, Ohio, who testified that in or about

November 19, 1958 he had received a call in the early evening from a person who purported to be a representative of Kimball (3317). According to Mr. Gairing's "best present recollection" at the trial, the person identified himself as "Mr. Koss" (3326). Previously, Mr. Gairing had answered an SEC questionnaire stating that the name of the salesman who called him was "Mr. Brandt" but that he was not positive (3226). The records of the Telephone Company were introduced in connection with the Gairing call to show that the person making such call gave his name as "Ross" (3307). Mr. Gairing also had received a confirmation slip in which the salesman was identified as "Salesman 24".

Other testimony adduced at the trial but not directly relating to the making of the telephone call to Mr. Mueller was the following:

(1) The testimony of Mr. Joseph Kimball, a Director of Kimball Securities, Inc., who testified that he did not even know that petitioner was employed by his company until he saw the indictment (2954). Mr. Kimball further testified that while he never actually heard any salesmen using names other than their own during telephone conversations, he believed that they probably used his name in phone calls when he was not around (2967). Mr. Kimball further testified that sales literature was provided by the company to its salesmen (3009) and that no one in Kimball Securities told the salesmen that the literature was untrue (3046). He conceded that he was in a better position to ascertain the facts than the salesmen were (3089).

Petitioner, Howard Ross, took the stand in his own defense. He testified that he had been employed by Kimball Securities for about two weeks from November 14 until December 1, 1958 (3389). He stated that he did

not recall whether or not he had called Mr. Mueller (3388). His job was selling numerous prospects over the telephone and he made many calls. Petitioner stated that one of the reasons he left Kimball Securities was that on a number of occasions he would find that other persons had been using his telephone and his prospect lists without his knowledge or consent (3504).

The Government conducted an extensive cross-examination of the petitioner. As can be seen from the portion of the transcript annexed hereto as Appendix C this cross-examination was devoted in substantial part (28 pages of the transcript) to a review of petitioner's prior activities in the securities business. Its sole purpose was to suggest and insinuate that petitioner had been associated with other fraudulent schemes and had on frequent occasions misled customers while employed by other firms. Numerous references were made by the prosecuting attorney to "boiler rooms" and to certain stocks which had received public notoriety. However, no proof whatever was adduced by the government that petitioner had ever engaged in any prior misconduct, whether criminal or noncriminal, and apart from the repeated suggestions and insinuations referred to above, the record is barren of such proof.

The most flagrant examples of this type of cross-examination were references made by the prosecuting attorney to the stocks of Swan-Finch and Doeskin Products. These were securities which had received great notoriety in the New York newspapers as being the subject of fraud and scandal. Although no proof whatever was introduced connecting petitioner with these stocks, the following prejudicial references thereto were made on cross-examination of petitioner with respect to his employment on a prior job with another firm:

"Q. What were you selling? A. I really don't remember.

Q. Could it have been Swan-Finch? A. No, sir.

Q. It couldn't? A. No, sir.

Q. Could it have been Doeskin Products? A. No, sir." (App. C p. 11).

At a later point this prejudicial reference was repeated with apparent understanding by the trial judge of its significance:

"Q. Is American Dryer still in business? A. I believe they are but I am not sure.

Q. I won't ask you about Swan-Finch now.

Mr. Berman: [trial counsel for petitioner] I don't understand that comment, your Honor.

The Court: Evidently you have not read the newspapers.

Mr. Berman: No, I have not.

The Court: Perhaps it is just as well, then." (App. C p. 14).

The prosecution never again asked petitioner about Swan-Finch. The "question" had obviously not been asked to obtain an answer, but to associate petitioner with the notorious Swan-Finch scandal in the minds of the jurors.

Upon the return of the jury's guilty verdict and a judgment of conviction, petitioner appealed to the Circuit Court of Appeals for the Second Circuit. On this appeal petitioner assigned two fundamental errors:

(1) The improper cross-examination of petitioner containing the numerous accusations, insinuations and suggestions of prior misconduct without any actual proof thereof. Petitioner's appeal placed heavy emphasis upon the grossly prejudicial references made by the prosecuting attorney to the notorious Swan-Finch stock; and

(2) The receipt in evidence of the testimony of Kelly identifying petitioner as Salesman No. 24 in clear violation of the hearsay and the best evidence rules and the consequent conviction of petitioner based solely on insufficient and inadmissible evidence.

During the pendency of the appeal, after the petitioner had served his brief on appeal which asserted prejudicial error by reason of the prosecutor's references at the trial to the Swan-Finch stock, the Government promptly moved before the District Court, pursuant to Rule 75(h) of the Federal Rules of Civil Procedure to have the transcript of the trial "corrected". The correction which the Government sought was the following:

That the words

"Q. I won't ask you about *Swan-Finch now*"

be deleted, and that the words

"Q. I won't ask you about *Havana-Racing* now"

be substituted.

In support of this motion the affidavit of the prosecuting attorney was submitted stating that it was "his best recollection" that he had referred to "Havana Racing" and not to "Swan-Finch", at that point in the trial (App. F p. 7). In addition, the affidavit of the court reporter was submitted which stated that his notes did not clearly indicate exactly what was said at that point in the trial, but his notes did not contain any reference to Swan-Finch at that point. The reporter added that he did not know why the words "Swan-Finch" appeared at that place in the transcript (App. F pp. 8, 9). In opposing the Government's motion to correct the record, the affidavit of petitioner's trial counsel was submitted stating that it was his distinct recollection that the prosecuting attorney had stated "Swan-Finch". Petitioner's trial counsel added certain corroborative reasons supporting his recollection. The petitioner's trial attorney stated that prior

to making the motion, the prosecuting attorney had told him that the prosecuting attorney had already discussed the matter with the court reporter. Petitioner's attorney requested that the motion be denied or that in the alternative a hearing be held on the question of the accuracy of the transcript so that the reporter could be examined, expert opinion obtained as to the meaning of his notes, and other witnesses to the event permitted to testify (App. F pp. 9-11). The Government joined in this request (App. F pp. 12, 13). Instead, the matter was referred to the original trial judge (Hon. Archie O. Dawson U. S. D. J. ), who, without holding any hearing in the matter, entered an order correcting the transcript in accordance with the Government's request. The trial judge stated:

> "I have a distinct recollection that the reference was not to Swan-Finch but to Havana Racing * * *" (App. F p. 1).

The transcript on appeal was thereupon changed so as to be in accordance with the recollection of the prosecuting attorney and the trial judge.

The Circuit Court of Appeals for the Second Circuit affirmed the judgment of conviction. Its written opinion (App. A) contained the following findings and conclusions:

(i) The Court of Appeals "fully accept[ed]" the trial court's correction of the record with respect to the mention of Swan-Finch.

(ii) The Court of Appeals conceded that the cross-examination of petitioner "insinuated prior misconduct", but held that this was perfectly proper in order to show that petitioner was not an innocent victim of circum-

stances, but had a long history of association with fraudulent securities transactions.

(iii) The Court of Appeals held that the defect in the hearsay evidence identifying petitioner as the person who made the telephone call to Mr. Mueller was supplied by the admission of the testimony of SEC investigator Kelly that petitioner was Salesman No. 24. It held that Kelly's testimony was properly admitted into evidence, notwithstanding the hearsay rule, and that any violation of that rule was not prejudicial. The Court virtually conceded that the admission of the Kelly testimony violated the best evidence rule. It held, however, that the best evidence rule was a mere "preferential" rule and that its invocation in this case for the protection of petitioner would have been an "undue formalism".

## Reasons for Granting the Writ

### 1. The "correction" of the transcript.

This Petition presents to this court for the first time the question of by what procedures the stenographic record of a criminal trial may be "corrected" pursuant to Rule 75 (h) of the Federal Rules of Civil Procedure during the pendency of an appeal. In the instant case, on motion of the Government and without according petitioner an opportunity for a hearing on the facts, the record was "corrected" to delete the prosecutor's prejudicial references to the notorious Swan-Finch shares. This correction was made based on the court's own recollection of the testimony and its concurrence with the assertion made by the prosecutor that he had not uttered the prejudicial remarks, but had said something else entirely. It is submitted that to permit the correction of the record under such circumstances, without affording petitioner

an opportunity for a hearing on the accuracy of the transcript, prevents grave constitutional dangers. It permits adverse determinations of fact to be made against petitioner on the vital issue of whether he got a fair trial without giving petitioner any opportunity to confront and cross-examine as is his constitutional right. *Green* v. *McElroy*, 360 U. S. 474, 496 (1959).

In the instant case the Government made no attempt to "correct" the transcript until the words in question had been assigned as prejudicial error in petitioner's brief on appeal. No explanation was furnished by the court stenographer as to how the words claimed by the Government to have been erroneous got into the transcript. Petitioner's trial counsel furnished an affidavit stating his specific recollection of the accuracy of the original transcript with respect to these prejudicial words. This raised a clear issue of fact which, it is submitted, should not have been determined by the trial court on its own recollection, without giving petitioner an opportunity to develop the facts by examining the stenographer and other witnesses.

Rule 75 (h) of The Federal Rules of Civil Procedure provides that differences with respect to the record be submitted to the district court and settled by that court and the record made to conform to "the truth". It is submitted that the use of the word "truth" in the Rule requires due process of law in determining truth and such due process requires an opportunity to develop the facts. To depart from this standard, clear language could and should have been used in the rule stating that the trial judge's recollection was to be the sole basis upon which such disputes would be determined. The instant case affords a striking example of why the rule should not be so interpreted. Here the Trial judge was an actual participant in the colloquy in which the prejudicial remark

was uttered not merely an observer (see *supra*, p. 7). His correction of the record, therefore, amounts to his sitting in judgment upon the propriety of his own conduct and determining that the error asserted against him did not occur.

In the instant case the trial judge made the correction because it accorded with his own "distinct recollection". But the very purpose of taking down testimony is to avoid relying upon the "distinct recollection" of anyone. If the transcript was to be abandoned in favor of the recollection of persons present, then petitioner had a right to test such recollection and proffer his own or other recollection. The utterance by the prosecuting attorney was made in the presence of judge, jury, counsel, court attendants, stenographer defendants and probably spectators. If prejudicial material is to be deleted from the transcript upon the ground that it never occurred, it should be done only after the facts have been developed in full, not upon a record dominated by the recollection of only one of the witnesses to the event.

**2. The improper Cross-examination.**

The cross-examination of petitioner by the prosecuting attorney is annexed hereto as Appendix C. We respectfully refer it to this court as a classic in insinuation, accusation and suggestion without proof.

Ironically, the Court of Appeals agreed that the cross-examination of petitioner was designed to suggest prior misconduct on his part which was not the subject of the indictment and did not reflect upon his credibility as a witness.

> "Ross claims it was error to allow this cross examination since it 'insinuated prior misconduct'. Of course, it did, but as the mere statement shows, the evidence was highly relevant * * *."

> "Here Ross has sought in his direct testimony to depict himself as an unwitting tool in Kimball's iniquitous venture; it was wholly proper for the Government to rebut this claim of ignorance and innocence by showing that *Ross had long drifted among houses selling similarly worthless stocks by similar methods.*" (App. A, p. 9, Emphasis added.)

The reasoning of the court of appeals that evidence of prior misconduct was relevant to the issue of whether Ross was merely an innocent pawn in the affairs of the Kimball Company, relies heavily upon authorities permitting cross examination to show prior crimes. It overlooks the fact that not only was no crime shown but nowhere, except by the accusation, suggestion and insinuation of the prosecutor, was it shown that any of the previous activities or experience of petitioner in the securities business constituted misconduct of any kind.

The finding by the Court of Appeals that Ross had "drifted among houses selling similarly worthless stocks" is without a shred of evidence of support. Even assuming that Ross had so "drifted" among such securities firms, the record is utterly barren of evidence of Ross's complicity in any misconduct surrounding the activities of said firms. The record is replete, however, with prejudicial references by the prosecuting attorney to the places in which Ross had worked as "boiler rooms" and with broad suggestions that the securities which he had sold were worthless. If, as we have seen, petitioner's very association with certain securities firms and petitioner's admission that he sold speculative securities over the telephone indelibly tainted petitioner with guilt in the eyes of the Court of Appeals, there can be no question but that this had a similar effect on the jury and that petitioner was denied a fair trial as a consequence thereof.

The error in establishing guilt by this means is obvious. It is not a crime to sell stock over the telephone and the statute contains neither a definition nor a prohibition of a "boiler room". It is submitted that the fact that the Court of Appeals or the Securities and Exchange Commission deem such activities reprehensible and injurious to the securities business does not constitute a basis for sentencing petitioner to imprisonment. The need for legislative reform in the substantive law in order to prohibit telephone sales of speculative stocks cannot and should not be met by changes in the rules of criminal evidence.

A review of the cross-examination of petitioner as reflected in Appendix C shows that he was asked to defend the activities of each firm he ever worked for, no matter for how short a period, and to establish the inherent value of each security he ever sold. Petitioner could not possibly have known of, or been prepared to meet, such accusations and insinuations. The authorities are clear that it was wholly improper to have subjected him to such accusatory cross-examination. *Edwards* v. *United States*, 18 F. 2d 402 (8th Cir. 1927); *People* v. *Richardson*, 222 N. Y. 103, 107 (1917). *Rizzo* v. *United States*, 304 F. 2d 810, 831 (8th Cir. 1962), cert. den. 371 U. S. 890 (1962).

### 3. The Conviction Based Solely on Hearsay

In reviewing the evidence against the petitioner, the Court of Appeals conceded that the mere fact that Mueller testified that the person who spoke to him on the telephone identified himself as "Mr. Ross" was not sufficient to convict petitioner of the crime. The Court of Appeals held that this deficiency was made good by the testimony of witness Kelly which purported to identify

petitioner as salesman number 24, the number that appeared on the written confirmation furnished to Mueller by mail:

> "Then Kelly, an investigator for the SEC, testified that in January, 1959, he visited the Kimball office and asked the cashier, Sussman, to identify the numbers that the salesmen used; that Sussman 'pointed to a list that was on the side of the cage, the cashier's cage, and it showed the numbers and the salesman who was assigned to that particular number on the list'; and that number 24 was assigned to Ross. This evidence, along with the inference from Ross's failure to deny that he called Mueller and Gairing or that his number was 24, was clearly sufficient, *N. Sims' Organ & Co.* v. *S. E. C.*, 293 F. 2d 78, 80-81 (2 Cir. 1961), cert. denied, 368 U. S. 968 (1962), *if Kelly's testimony was admissible*." (App. A, pp. 13, 14). (Emphasis added.)

The Court of Appeals recognized that Kelly's testimony that three years previously Mr. Sussman had pointed to a list showing the names and numbers of salesmen, and that on said list Ross' name was identified by No. 24, constituted plain hearsay. However, although petitioner's trial counsel made his hearsay objection to this line of testimony very clear (App. D, p. 1), the Court of Appeals strangely held that petitioner had waived the hearsay violation by failure to object. In addition, the Court of Appeals found that the hearsay error "would not be prejudicial" (App. A, p. 14). The Court then proceeded to discuss whether Kelly's testimony as to the content of the written list was admissible under the best evidence rule and held that the enforcement of the best evidence rule for the protection of the petitioner in the instant case would have been "an undue formalism" (App. A, p. 15).

The foregoing determinations by the Court of Appeals on the admissibility of the evidence constituted plain error which resulted in their affirmance of petitioner's conviction for crime based on pure hearsay and nothing more.

Reviewing the steps in the Court of Appeals decision: First, petitioner's trial attorney could not, in any sense, have been deemed to have waived his hearsay objection to the testimony. He stated:

> "Your Honor, I would like to object to this answer and to any further questions along this line. I would like to object to these statements as being hearsay" (App. D, p. 1).

Secondly, contrary to the Court's contention, there was no non-hearsay testimony which rendered the hearsay testimony mere harmless error. It was *all* hearsay and it was all prejudicial. It should be noted that the alleged list of salesmen would itself have constituted nothing more than a hearsay communication, unless it was qualified as a business record with all of the requirements of authenticity, accuracy, and regularity which that term implies. *Bisno* v. *United States*, 299 F. 2d 711, 718 (9th Cir. 1961), cert. den. 370 U. S. 952 (1962). There was no evidence whatever that the list shown by Sussman to Kelly constituted a record made and kept in the regular course of business. The problem, therefore, was not merely whether under the best evidence rule oral testimony could be given as to the content of a written document, without first explaining why the document was not itself produced. The question was whether any testimony could be accepted as to the content of the document when on this record the document itself would have constituted nothing more than a hearsay declaration. *Haas* v. *United States*, 93 F. 2d 427, 436 (8th Cir. 1937).

The only evidence in the record identifying the list is Mr. Kelly's testimony that when he asked about the salesmen, Mr. Sussman pointed to the wall without saying a word. Mr. Sussman although in court as a witness for the government was not questioned on this matter at all. It is a fact that if Mr. Sussman took the stand today, and swore that he signified something else entirely by pointing to the wall, or that the list that he pointed to was not up to date, or that it was not accurate, or that he had prepared the list especially to mislead Mr. Kelly and that it was not a business record of the company, or, that Kelly's recollection of the content of the list was inaccurate, such testimony would in no way conflict with any of the testimony given at the trial. How petitioner's attorney could have been expected to test the credibility of this type of evidence is beyond the comprehension of any practicing lawyer.

Finally, with respect to the best evidence rule, the Court of Appeals conceded that a strict application of this rule would require the exclusion of the Kelly testimony since there was nothing in the record to establish that any diligent effort had been made to produce the list itself. The Court, however, considered the rule merely a preferential rule of evidence, the enforcement of which would constitute "an undue formalism". In this respect the Court's error is virtually self-confessed. We submit that it is more than a technicality and a formalism that neither the witness in whose possession the list originally was, nor the investigator who attached so much importance to it, was called upon to explain what efforts had been made either to locate or preserve this important document which held the key to the government's case. It is elementary that under these circumstances the Kelly testimony violated the best evidence rule and should not have been admitted. *United States* v. *Haugen*, 58 F. Supp. 436,

440 (1944); *Sellmayer Packing Co. v. Commissioner of Internal Revenue*, 146 F. 2d 707, 709 (4th Cir., 1944).

The consequence of the abandonment by the Court of Appeals of the rules of evidence is that petitioner was convicted upon a record in which every single item of identification was hearsay and inference from hearsay. These were:

(1) An unidentified telephone voice claiming to be Mr. Ross.

(2) The hearsay testimony of Mr. Kelly that Mr. Ross' name appeared on a list to which Mr. Sussman silently pointed three years before the trial.

It has always been the rule that a criminal conviction can not rest on such a fragile foundation. *Symonette v. United States*, 47 F. 2d 686 (5th Cir., 1931). This Court should not permit an exception to be made in the field of securities regulation.

## CONCLUSION

**For the above reasons petitioner prays that a Writ of Certiorari be granted.**

Respectfully submitted,

JESSE CLIMENKO
*Attorney for Petitioner*
GALLOP CLIMENKO & GOULD.

JESSE CLIMENKO,
MILTON S. GOULD,
SHELDON D. CAMHY,
*Of Counsel.*

## Appendix A

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 335—October Term, 1962

(Argued May 27, 1963 Decided July 5, 1963)

Docket No. 28033

UNITED STATES OF AMERICA,

*Appellee,*

*v.*

HOWARD ROSS and PAUL GORDON,

*Defendants-Appellants.*

Before—WATERMAN, FRIENDLY, and SMITH,

*Circuit Judges.*

Appeals from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, Judge, convicting defendants of securities fraud after a jury verdict. Affirmed.

MILTON S. GOULD (Gallop, Climenko & Gould, New York, New York, Alan J. Hartnick, of Counsel), for Appellant Howard Ross.

JACOB W. FRIEDMAN, New York, New York, for Appellant Paul Gordon.

THOMAS J. CAHILL (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Arnold N. Enker, Assistant United States Attorney, of Counsel), for Appellee.

FRIENDLY, *Circuit Judge*:

These appeals concern another episode in the fraudulent career of Kimball Securities, Inc., one phase of which has recently been recounted in *United States* v. *Aronson*,— F. 2d— (2 Cir. 1963). Indeed, the two trials sprang from the same indictment. A preamble to this charged, substantially in the language of § 17 of the Securities Act of 1933, 15 U. S. C. § 77q, that Kimball Securities, Inc., and numerous other persons, including Gordon and Ross, by the use of transportation and communication in interstate commerce and of the mails, employed a device, scheme and artifice to defraud, obtained money and property by untrue statements of material facts and omissions to state material facts necessary to make the statements not misleading, and engaged in transactions that operated as a fraud and deceit on purchases of various securities, including common stock of Mark, Inc. The trial of Gordon on three substantive counts and a conspiracy count and of Ross on two substantive counts and the conspiracy count was severed from that of the Aronsons. At the close of the Government's case, the judge dismissed two substantive counts against Gordon, one against Ross, and the conspiracy count against both. The remaining counts, which were submitted to the jury, were Count 3, charging Gordon and others with use of the mails to send a confirmation of a purchase of Mark, Inc. stock to Hazel, Mae & Sam King, Jr., in Conway, Arkansas, and Count 10, charging Ross and others with use of the mails to send a confirmation of a purchase of Mark, Inc. stock to William S. Mueller in Amherst, Mass., both acts alleged to be "in furtherance of said scheme and artifice to defraud." Verdicts of guilty, judgments of conviction, sentencing and appeals followed.

Kimball Securities, Inc. was a typical "boiler-room" operation. Joseph Kimball, its president and guiding light, who had pleaded guilty, gave a vivid description of its sales methods. The process would begin by sending to persons on various occupational lists, "such as doctors, plumbers, anything you want," which Kimball owned or would purchase, "teaser letters" describing the bright financial future afforded by low-priced stocks.[1] These were followed by sales literature touting some particular stock. Next would come a telephone call from a salesman called an "opener", who "would try and sell the prospect as much or as little as he could." This would be followed by more mail relating the "good news about the company," and then by the knock-out blow, a call from a "high-pressure salesman", colorfully characterized as a "hoader", who would "try and increase the purchase of the stock."

One of the stocks to which Kimball turned its attention was that of Mark, Inc.; it arranged with one Cass, an officer of Mark, to sell this stock on a basis whereby the proceeds would be divided equally between Cass and Kimball. From July 24, 1958 to February 5, 1959, this was the only security—we rather hesitate to use that word—which Kimball sold; the price went from $1.50 to $2.35 per share; 258,000 shares were sold to 790 customers.

Sam King, a plumber living in Conway, Ark., testified that during July, 1958, he received some literature from Kimball concerning Mark, Inc. About a week later he received a telephone call at his home, between 6 and 7 P.M. Central Standard Time, from a man who identified himself

1. One of these was headed "How a $65 a Week Teacher Made $1,000,000 in the Stock Market." "*The secret of his success*" was said to be "that he shunned investment grade issues in preference to speculative ventures in shares of little known companies."

as Paul Gordon of Kimball Securities. A telephone company toll ticket established that on July 28, 1958, at 8:35 P.M. Eastern Daylight Saving Time (equivalent to 6:35 P.M. Central Standard Time), a call to King, lasting 20 minutes, was made from Gordon's home and charged to the Kimball number. King testified that the caller, who claimed he had been given King's name by a friend of King's, said that Kimball Securities had a block of shares in Mark, Inc. and he was getting some new customers, that Mark, Inc. "was an old reliable company and they were mining, and they were going to merge it with a helicopter firm, and the stock would double in probably thirty days, and that he would advise me when to sell and when to buy." King asked whether Kimball Securities was "anything like Merrill, Lynch, Pierce, Fenner & Beane." The caller, owning that "it was not as big an organization," said "it was just as reliable"; he also stated that if King didn't make any money, he couldn't either, and that he was staying late in his office to make calls to King and others. King bought 300 shares at $1.50 each. A man identifying himself as Gordon and having the same voice as the first caller telephoned later to urge further purchases. When King tried to sell the shares, he was informed by a Little Rock brokerage firm that no takers could be found at a price of 40 cents. Gordon did not testify.

Gordon's appeal raises no questions of identification worthy of discussion, since the toll ticket was ample evidence to support a finding that he was the man who telephoned King. We shall discuss his claim of error in refusing to strike the testimony of the witness Gentzel when we come to Ross' appeal. His major contention is that there was insufficient evidence of violation of § 17 of the Securities Act because he was warranted in relying

on the information about Mark, Inc. given him by his employer. We should have the greatest difficulty in accepting that argument on the facts here. Even though Gordon was employed at Kimball's for only seven working days, the five that had elapsed before his call to King should have sufficed to teach anyone, particularly a man like Gordon, who had previously worked for a respected securities firm, exactly what was going on; moreover, the "literature" on Mark prepared by Kimball was suspicious on its face to anyone with the slightest financial knowledge.[2] The evidence against Gordon was far more damn-

2. The literature included an illustrated booklet whose cover contained a drawing of oil wells and oil tanks with the two words of the corporate title, "Mark, Inc." separated by a rocket; other "plates" were entitled "Imagination," "Brainstorming," "Experience," "Soundness," "Creative Thinking," "Vision," etc. Another sales item, "Kimball's Investment Notes," apologized for delay in the sending of "your 20 page, full color brochure" due to the "unprecedented demand"; it showed "Mark Annum Net Earnings" of 4.39¢ per share for the year ended March 31, 1958, which were to be expanded to a potential of 31.08¢.

Neither these exhibits nor still more important pieces of evidence, such as the telephone company toll ticket showing Gordon's call to King or the confirmation slip mentioned below, were included in "the original papers" transmitted by the clerk of the district court pursuant to F. R. Civ. Proc. 75(o), here applicable by virtue of F. R. Crim. Proc. 39(b) and our Rule 11; nor were they reproduced in the appendices required by our Rule 15(b), or submitted in accordance with the alternative procedure authorized by our Rule 10(a). This failure to make pertinent exhibits available to us, save by special request to counsel on our part, is by no means unique to this appeal. We get the testimony because it has been lodged with the clerk of the district court who sends it along, but generally, especially in criminal appeals, we do not receive exhibits that often are far more probative, because counsel have simply kept them and make no effort to have them sent to us. For a variety of reasons, it would seem desirable that exhibits of modest size pertinent to an impending appeal be lodged with the clerk of the district court so that he can forward them along with the transcript; the announced purpose of the reform embodied in F. R. Civ. Proc. 75(o) was to give "the appellate court the advantage of having before it the original papers just as they were presented to

ing than what we have held sufficient in revocation proceedings, see *Berko* v. *SEC*, 316 F. 2d 137 (2 Cir. 1963). We are not here required to determine how far the principles set forth in that and other decisions apply also in criminal prosecutions. For the jury was warranted in finding, under the proper instructions it received, that Gordon knowingly lied when he made statements to King which were not based on information supplied by Kimball, such as that he had gotten King's name from a friend, that Kimball Securities was "just as reliable" as Merrill Lynch, that he would make no money unless King did, and that he was staying late in the office to make the call. It would have been justified also in finding that when Gordon stated his expectation that the stock would double in price in thirty days, he was voicing a belief that did not exist (unless it was based on the expected results of Kimball's high pressure sales campaign, in which event he was omitting "to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading"), and that when he agreed to advise King when to sell, he was making a statement he had no intention of carrying out. All these alleged misrepresentations were plainly frauds within statutes antedating § 17(a)(2), see *Bonted* v. *United States*, 13 F. 2d 327, 329 (2 Cir.), cert. denied *sub nom. Amos* v. *United States*, 273 U. S. 713 (1926); *Van Riper* v. *United States*, 13 F. 2d 961, 964-65 (2 Cir.), cert. denied *sub nom. Ackerson* v. *United States*, 273 U. S. 702 (1926); and within that section also, 3 Loss,

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the trial court." Committee Note of 1946. Whether this has been done or not, exhibits which counsel desire us to consider are subject to our Rule 15(b) relating to appendices or to the alternative permitted by Rule 16(a).

Securities Regulation (2d ed. 1961) 1430-39, and authorities cited.[3]

Ross was in Kimball's employ for the last two weeks of November, 1958. The count against him that was submitted to the jury related to a call allegedly made to William S. Mueller, a research professor at the University of Massachusetts, which resulted in the sale of 100 shares of Mark, Inc. at $2.35 per share on November 26. The caller, identifying himself as Ross, told Mueller, who had previously received the "investment news letter" about Mark, that Mark "was a very sound investment, that he was quite certain that the stock would at least double in approximately six months, and that it might go as high as $10 to $14 a share within six months," and also that Kimball Securities "was a very reliable company, that they had hired stock analysts who were analyzing the various stocks so as to protect their customers." Ross testified that he could not remember whether or not he had called Mueller, that he had studied Kimball's literature about Mark for almost a day and thought it was "a good security" and "should be selling at a higher price" if all the reports were true, and that he left Kimball principally because he found

3. Gordon complains also of slighting references to his trial counsel by the judge; the Government claims these were merited. While Gordon's trial counsel may not have exhibited all the forensic skills that might be desired, our reading of the cold record alone would not lead us to conclude that his conduct warranted the rebukes that were rather consistently administered to him. Although we realize how discouraging it must be for an experienced trial judge to see valuable time being lost or to hear questions that are improperly framed, it would be better to address any necessary admonitions to counsel outside the hearing of the jury. However, we cannot believe that the remarks complained of were sufficiently prejudicial to call for reversal, in view of the strength of the Government's case against Gordon and of the fact that, unlike *United States* v. *Brandt*, 196 F. 2d 653 (2 Cir. 1952), and *United States* v. *De Sisto*, 289 F. 2d 833 (2 Cir. 1961), which Gordon cites, the judge's comments here did not reflect on the defendant's case so much as on the way it was being handled.

someone else at his desk and the prospect cards assigned to him strewn about. Postponing questions as to the application of the hearsay and best evidence rules in connection with the identification of Ross as Mueller's caller, we shall first deal with other points raised on his appeal.

Over consistent objection by defense counsel, the prosecutor subjected Ross to extensive cross-examination on his career as a stock salesman. He brought out that Ross was first employed in 1955, for two to three weeks, by Brown, Barton & Engel in Newark, which sold only one stock, Randex Uranium, Ross' sales being made by telephoning names supplied by the office; he was allowed to ask whether Ross told customers that Randex was a good speculation and that Ross believed the price would go up—questions that Ross answered in the affirmative although he knew "nothing about the operations at all"—and whether Randex or Brown, Barton & Engel were still in business, as to which Ross disclaimed knowledge. Further questioning took Ross to Golden, Dersth in New York, where, for five weeks, he sold "a few securities", also over the telephone, including American States Oil and "South something, a racing stock, but I can't recall the name of it"; to M. T. Schuck, where, for a few weeks, he sold Great Sweetgrass over the phone; to C. F. Rothschild, where for six months he made telephone sales of Great Sweetgrass, Kroy Oil, and United Dye & Chemical; and to other firms, including Mack Robbins, Philip Newman & Associates, and Steven Randall, selling stocks over the telephone. He left several of these houses because they were being investigated by the SEC. He did not remember what stock he had sold at Steven Randall, giving negative answers when asked whether it could have been Swan-Finch or Doeskin Products; when asked whether it could

have been Havana Racing, he thought "there was a Havana Racing now that I recollect, and then I recollect another company, I believe it was American Dryer." He admitted regularly telling his prospective customers that the stock he was selling was a "good speculation" and would go up in price—his reliance for this being on sales literature; questions as to whether the employer and the company were still in business elicited varying responses.

Ross claims it was error to allow this cross-examination since it "insinuated prior misconduct." Of course it did, but, as the mere statement shows, the evidence was highly relevant. Evidence of "other crimes" is admissible "to show, by similar acts or incidents, that the act on trial was not inadvertent, accidental, unintentional or without guilty knowledge." McCormick, Evidence (1954), at 329. "The prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." 2 Wigmore, Evidence (3d ed. 1940), at 200. Furthermore, "when the crime charged involves the element of knowledge, intent, or the like, the state will often be permitted to show other crimes in rebuttal, after the issue has been sharpened by the defendant's giving evidence of accident or mistake, more readily than it would as part of its case in chief at a time when the court may be in doubt that any real dispute will appear on the issue." McCormick, *supra*, at 331. Here Ross had sought in his direct testimony to depict himself as an unwitting tool in Kimbell's iniquitous venture; it was wholly proper for the Government to rebut this claim of ignorance and innocence by showing that Ross had long drifted among houses selling similarly worthless stocks by similar methods. The case is so totally different from *United States* v. *Provoo*, 215 F.

2d 531, 534-37 (2 Cir. 1954) and others cited by Ross that discussion of them would be superfluous.[4]

Perry H. Gentzel, an engineer residing at State College, Pa., was a victim of Kimball's promotion of Mark on a

4. Much ink has been spilled in the briefs and appendices over an episode in Ross' cross-examination where the transcript shows the following at the close of the examination in regard to his activity at Steven Randall:

"Q. Is American Dryer still in business? A. I believe they are but I am not sure.

Q. I won't ask you about Swan-Finch now.

Mr. Berman: I don't understand that comment, your Honor.

The Court: Evidently you have not read the newspapers.

Mr. Berman: No, I have not.

The Court: Perhaps it is just as well, then.

Mr. Berman: All right, your Honor, excuse me."

After Ross had filed his brief in this Court alleging particular prejudice because of this mention of Swan-Finch, the Government moved in the District Court, under F. R. C. Proc. 75(h) and F. R. Crim. Proc. 39(b)(1), to correct the record to substitute "Havana Racing" for "Swan-Finch." After considering the reporter's affidavit that he was certain the reference was not to Swan-Finch, although he didn't know how those words got transcribed; defense counsel's affidavit that in his recollection "Mr. Morrison [the prosecutor] mentioned Swan-Finch" and that Morrison had told him he wasn't sure which name he had mentioned and that the reporter wasn't sure either; and Morrison's affidavits that in his recollection he said "Havana Racing," that he never told defense counsel he wasn't sure what he said but rather that he was sure he said "Havana Racing," and that he never told defense counsel he had discussed the matter with the court reporter, Judge Dawson granted the Government's motion, stating that he had "a distinct recollection that the reference was not to Swan-Finch but to Havana Racing" and calling attention to the occurrence of the episode on October 31, 1962, a date during the Cuban crisis when "anybody acquainted with the newspapers would know that Havana Racing was not a going concern." We fully accept Judge Dawson's recollection, which in addition to all else, fits the context of the questioning better than the transcript as written. But if the case were otherwise, we would still fail to perceive how mere repetition of a reference to Swan-Finch, which had elicited no objection when first made and provoked no request for action by the judge on the alleged repetition, see *United States v. Iaucci*, 310 F. 2d 817, 836-38 (2 Cir. 1962), could constitute a sufficient ground for reversal.

larger scale than King or Mueller. He testified that in the latter part of November, 1958 (four months after Gordon had left Kimball's but during Ross' employment there), he received a number of calls from a Kimball salesman who identified himself as Norman Thomas, and made the usual optimistic comments about Mark, Inc., including a statement that it would be listed on the stock exchange. These led to purchases totalling 9,100 shares, some at $1.95 and others at $2.35 per share. Gentzel admitted that he had never talked to anyone who identified himself as Ross, and the Government did not seek to rest admissibility on the theory that "Norman Thomas" was a fictitious name used by Ross, although a telephone company witness testified to a call made from the Kimball office to Gentzel on November 25 by a party giving the name of Ross and there was evidence that Kimball had never employed a "Norman Thomas". The theory of admissibility seems rather to have been that the indictment charged a scheme and artifice to defraud and that Gentzel's testimony tended to show the existence of a scheme on the part of Kimball Securities and its salesmen. At the conclusion of Gentzel's testimony the judge said in the jury's presence that he didn't think that "it adds very much as to these two defendants. It does add to the general effect, but the general effect has been well established by Mr. Kimball * * *." However, on the next morning, after his dismissal of the conspiracy count, he denied a motion to strike Gentzel's testimony.

A charge of a "device, scheme, or artifice to defraud" does not require proof of participation by more than one person. *Pereira* v. *United States*, 347 U. S. 1, 11 (1954). On the other hand, a "scheme" involves some connotation of planning and pattern, and it is hard to doubt that evidence showing that the conduct charged to a defendant

followed a pattern of fraud similar to one that was being contemporaneously practiced by a fellow employee, or even that was followed later by another employee of the same house with respect to the same stock, has enough logical bearing to pass the test of relevancy. Despite the dismissal of the conspiracy count, the evidence would seem to have been admissible as the act of a co-conspirator if the judge had determined, as he properly might have, that "evidence, other than that whose admissibility is under challenge, discloses" a conspiracy. *United States* v. *Annunziato*, 293 F. 2d 373, 378 (2 Cir.), cert. denied, 368 U. S. 919 (1961), and cases cited; *Reistroffer* v. *United States*, 258 F. 2d 379, 387 (8 Cir. 1958), cert. denied, 358 U. S. 927 (1959). The amount of proof *aliunde* as to the existence of a conspiracy that is required to render such evidence admissible is not as high as the amount needed to warrant submission of a conspiracy charge to the jury. *See United States* v. *Nardone*, 127 F. 2d 521, 523 (2 Cir.), cert. denied, 316 U. S. 698 (1942). And since the utterances of "Norman Thomas" were offered as acts rather than as declarations, their admissibility against Gordon would not be destroyed by Gordon's previous withdrawal from the conspiracy. *Lutwak* v. *United States*, 344 U. S. 604, 617 (1953). It is true that the judge did not rest his ruling on this theory; after saying that "It takes more than that [the Government's evidence] to prove a conspiracy," he ruled simply that "Gentzel's testimony to the extent it is relevant will remain in the record." Still we should hardly be warranted in reversing for the admission of evidence simply because the judge did not place his ruling on the ground that would most readily have supported it. Moreover, we see no reason why the admissibility of relevant "acts," as distinguished from declarations, of an associate need rest

on the existence of a conspiracy, since no hearsay problem is involved. See *Roe v. United States*, 316 F. 2d 617, 622-25 (5 Cir. 1963). Finally, even if we should be wrong in all of this, admission of the evidence was not so prejudicial as to call for reversal. In the presence of the jury, the judge had made not only the statement quoted above but a number of other remarks as to the lack of force in Gentzel's testimony as against Gordon and Ross; he would doubtless have included a limiting instruction on this subject in his charge if requested to do so.

This brings us to the serious issues raised in Ross' appeal. The fact that the man who phoned Mueller identified himself as Ross was not sufficient to permit the jury to infer that Ross was the caller. 7 Wigmore, Evidence, *supra*, at 617. The Government sought to supply the needed additional evidence in several ways. Walter Gairing, who lived in Wadsworth, Ohio, testified that on or about November 19, 1958, he had received a call in the early evening concerning Mark, Inc. from a Kimball salesman who identified himself as Ross; telephone company records showed a call to Gairing's number from Kimball Securities by a person named Ross at a corresponding hour on November 18. Both Mueller and Gairing identified confirmation slips in which there was typed in a blank after the word "Salesman" the number "24". Vien Kelly, an investigator for the SEC, testified that in January, 1959, he visited the Kimball office and asked the cashier, Sussman, to identify the numbers that the salesmen used; that Sussman "pointed to a list that was on the side of the cage, the cashier's cage, and it showed the numbers and the salesman who was assigned to that particular number on the list", and that number 24 was assigned to Ross. This evidence, along with the inference from Ross' failure to deny that he called Mueller and Gairing or that his number was 24, was clearly

sufficient, *N. Sims Organ & Co. v. S. E. C.*, 293 F. 2d 78, 80-81 (2 Cir. 1961), cert. denied, 368 U. S. 968 (1962), if Kelly's testimony was admissible.

Ross contends that admission of the testimony violated both the hearsay rule and the best evidence rule. It is plain enough that Kelly's testimony about Sussman's pointing to the list was not outside the hearsay rule merely because Sussman used no words; the pointing was as much a communication as a statement that "This is a list of the names and numbers of the salesmen" would have been. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 190-92 (1948). But Ross' trial counsel, although he had objected on the ground of hearsay when Kelly was first interrogated concerning his request that Sussman identify the numbers the salesmen used, did not repeat the hearsay objection when Kelly testified to the pointing. We would not wish to rely on what may seem so technical a point were it not that the objection itself is so technical and that the failure to repeat the hearsay objection, when coupled with the vigorous objection on other grounds, may well have distracted the judge's attention from the hearsay problem; if objection had been properly raised, this problem very likely could have been met by recalling Sussman. In any event, Kelly's testimony about the list itself, the character of which was indeed not disputed, would seem sufficient non-hearsay evidence to establish the meaning of that document—if such testimony was not barred by the best evidence rule; any hearsay error would therefore not be prejudicial.

Counsel did object "On the ground that the list is the best evidence, and it will speak for itself, and the proper foundation has not been laid to indicate whether the list was valid or a legitimate list, whether the list was in fact a part of the broker's business or the business of the sales-

men." The judge thereupon asked Kelly, "Have you got that list or was it left there?" Kelly answered, "It was left there, but I took down information including the names and the numbers," after which the judge said "I think that is sufficient to lay the foundation" and permitted Kelly to testify as to salesmen's numbers on the list, including Ross'.

This evidence, offered to prove the contents of a writing, was within the best evidence rule, 4 Wigmore, *supra*, §§ 1178, 1183, and the reasons for it. *Id.* § 1179. Production of the list was therefore required unless it was not feasible. *Id.* § 1192. The proper procedure was for the Government to seek to establish from Kelly, Sussman, or Kimball that the list no longer existed in the fall of 1962 when the case was tried; we cannot understand why this was not done. But there had been testimony that the Kimball firm had gone out of business in February, 1959, and the judge was evidently convinced that a paper of so little permanent value as the list in the cashier's cage would not be available more than three and a half years later. Much less of a search is required to permit the use of secondary evidence when "the subject of inquiry [is] a useless paper, which may reasonably be supposed to be lost * * *." *Brewster* v. *Sewell*, 3 B. & Ald. 296, 299, 106 Eng. Rep. 672, 673 (1820). Moreover, great deference is accorded to the trial judge's determination of this issue of feasibility. McCormick, *supra*, at 414; *Galbreath* v. *United States*, 257 Fed. 648, 658 (6 Cir. 1918); indeed, Wigmore urges that the issue "should be left entirely to the *trial Court's discretion*." Vol. 4 at 340. It can be argued that these authorities relate only to cases where there was some evidence of a search whereas here there was none. But we would think it an undue formalism to reverse Ross' conviction because of a possible violation of this merely

preferential rule of evidence under the circumstances here presented—where the probabilities that the paper no longer existed are in fact so strong, the "writing" being proved was so simple, there was no ground for suspecting the accuracy or good faith of Kelly's observation, and Ross, who testified on his own behalf, did not even question that 24 was his number.

Affirmed.

## Appendix B

### Text of Applicable Statutes and Rules

SECURITIES ACT 1933

15 U.S.C. §77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section. May 27,

1933, c. 38, Title I, § 17, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 10, 68 Stat. 686.

15 U.S.C. §77x. Penalties

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both. May 27, 1933, c. 38 Title I, § 24, 48 Stat. 87.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 39. Supervision of Appeal.

(a) Supervision in Appellate Court. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for direction to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

(b) The Record on Appeal.

(1) Preparation and Form. The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal.

in all criminal proceedings, except as otherwise provided in these rules.

(2) Use of Typwritten Record. The court of appeals may dispense with the printing of the record on appeal and review the proceedings on the typewritten record.

(c) Docketing of Appeal and Record on Appeal. The record on appeal shall be filed with the appellate court and the proceeding there docketed within 40 days from the date the notice of appeal is filed in the district court, but if more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date the first notice of appeal is filed. In all cases the district court or the appellate court or, if the appellate court is not in session, any judge thereof may for cause shown extend the time for filing and docketing.

(d) Setting the Appeal for Argument. Unless good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than 30 days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar will permit. Preference shall be given to appeals in criminal cases over appeals in civil cases. As amended Dec. 27, 1948, eff. Jan. 1, 1949.

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 75. Record on Appeal to a Court of Appeals.

(a) Designation of Contents of Record on Appeal. Promptly after an appeal to a court of appeals is taken,

the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(b) Transcript. If there be designated for inclusion any evidence or proceeding at a trial or hearing which was stenographically reported, the appellant shall file with his designation a copy of the reporter's transcript of the evidence or proceedings included in this designation. If the designation includes only part of the reporter's transcript, the appellant shall file a copy of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. The copy so filed by the appellant shall be available for the use of the other parties. In the event that a copy of the reporter's transcript or of the necessary portions thereof is already on file, the appellant shall not be required to file an additional copy. When the rules of the court of appeals so require, the appellant shall furnish a second copy of the transcript for use in the appellate court. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(c) Form of Testimony. Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof.

(d) Statement of Points. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. As amended Dec. 27, 1946, effective March 19, 1948.

(e) Record To Be Abbreviated. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

(f) Stipulation as to Record. Instead of serving designations as above provided, the parties by written

stipulation filed with the clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

(g) Record to be Prepared by Clerk—Necessary Parts. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (f) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(h) Power of Court to Correct or Modify Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly

discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected; and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

(i) Order as to Original Papers or Exhibits. Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

(j) Record for Preliminary Hearing in Appellate Court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose.

(k) Several Appeals. When more than one appeal is taken to the same court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication.

(*l*) Printing. What part of the record on appeal filed in the appellate court shall be printed and the manner of the printing and the supervision thereof shall be as prescribed in the rules of the court to which the appeal is taken; but the type, paper, and dimensions of printed matter in the court of appeals shall conform to the Rules of the Supreme Court relating to records on appeals to that court. As amended Dec. 29, 1948, effective Oct. 20, 1949.

(m) Appeals in Forma Pauperis. Upon leave to proceed in *forma pauperis*, the district court may by order specify some different and more economical manner by which the record on appeal may be prepared and settled, to the end that the appellant may be enabled to present his case to the appellate court. Added Dec. 27, 1946, effective March 19, 1948.

(n) Appeals When No Stenographic Report Was Made. In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the

objections or proposed amendments, shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal. Added Dec. 27, 1946, effective March 19, 1948.

(o) Rule for Transmission of Original Papers. Whenever a court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. The transmittal shall be within such time or extended time as is provided in Rule 73(g), except that the district court by order may fix a shorter time. The clerk shall transmit all the original papers in the file dealing with the action or the proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court. The provisions of subdivisions (h), (j), (k), (l), (m), and (n) shall be applicable but with reference to the original papers as herein provided rather than to a copy or copies. Added Dec. 27, 1946, effective March 19, 1948; as amended Dec. 29, 1948, effective Oct. 20, 1949.

## Appendix C

*Excerpts from Cross-Examination of Petitioner*

Excerpts from Cross-Examination of Petitioner.

* * *

[3410] Q. Will you tell us for whom you went to work at that time? A. Brown, Barton & Engel in New Jersey.

Mr. Berman: If your Honor please, I would like to object to all this. Mr. Morrison is now asking questions which are no part of any questions asked in the direct examination and, therefore, it is improper cross-examination at this time.

The Court: Overruled.

Mr. Berman: Exception.

Q. You said that the first firm that you went to work for was Brown, Barton & Engel? A. Yes.

Q. That was in 1955? A. Yes

Q. Where were they located? A. In Newark, New Jersey.

Q. Were they a member firm, that is, a member of any exchange, or were they an over-the-counter house? A. They were an over-the-counter house.

Q. Over-the-counter? A. Yes.

[3411] Q. How long were you with them? A. A very short period of time, possibly two weeks, possibly three.

Q. Two to three weeks? A. I believe so, to the best of my recollection.

Mr. Berman: I would appreciate it, your Honor, if the assistant United States attorney would not repeat the defendant's answers in his questions. The jury can hear the defendant's answers without having the district attorney himself say it.

The Court: All right.

*Excerpts from Cross-Examination of Petitioner*

Mr. Morrison: Your Honor, may we have the last question read?

The Court: It has been answered. You may ask another question. He said he was employed in New Jersey for two or three weeks.

Q. Can you tell us what stocks they were selling? A. To the best of my knowledge, it was Randex Uranium.

Q. Randex Uranium? A. Yes.

Q. Any other stocks? A. No.

Q. Only one stock? [3412] A. In fact, it actually was not being traded to the public; it was in syndication yet.

Q. I mean, you say there were no other stocks that you were selling while you were at Brown, Barton & Engel?

Mr. Berman: If your Honor pleases, I would like to object to this, whether he sold any other stocks while with that company before the year 1955, because it is improper.

The Court: You say it is improper but I rule that it is a proper question. Objection overruled.

Mr. Berman: Note my exception on the record.

The Court: Your objection is overruled.

Mr. Berman: Exception.

Q. Were you selling Polaroid then? A. No.

Q. You were just selling Randex Uranium? A. Yes.

Q. And you sold that for two or three weeks? A. Yes.

Q. Did you sell that by telephone? A. Yes.

Q. Where did you get the names to whom to make the telephone calls? [3413] A. They were supplied by the office.

Q. Who was the sales manager? A. I don't recall his name.

*Excerpts from Cross-Examination of Petitioner*

Q. Did you have any literature in connection with Randex Uranium? A. Yes, a prospectus.

Q. And you were selling from the literature that you were furnished with? A. Yes.

Q. And it was a pretty good stock you thought from the literature? A. Yes.

Q. And I assume that Randex Uranium was a good speculation, was it?

Mr. Berman: I object to that question. We are not interested in what the prosecution assumes at all, your Honor.

The Court: He is asking the witness. Did you believe it was a good speculation?

The Witness: Well, yes, it was a good speculation at that time according to the prospectus.

Q. And is that what you told the customers? A. Yes.

Mr. Berman: Now, if your Honor please, the [3414] defendant is not on trial for anything having to do with the value of the stock called Randex Uranium.

The Court: The jury knows what he is on trial for. Do you object to the question?

Mr. Berman: Yes, it is an improper question, I think, and I can't see any materiality to the litigation here.

Th Court: Maybe you can't, but I can. I overrule your objection.

Mr. Berman: Exception.

Q. Did you tell your customers that Randex Uranium was a good speculation? A. Yes.

*Excerpts from Cross-Examination of Petitioner*

Q. And did you tell them that you thought that the price would go up? A. I believe I might have said that.

Q. Did you believe at that time that the price should go up in Randex Uranium? A. From what the prospectus stated, it certainly looked that way to me.

Q. Do you recall by any chance what it was that made you think that Randex Uranium may be an interesting or a good speculation? A. Well, it is almost six years ago I would say, [3415] and I remember that they had properties in—I believe it was in Canada, or some properties which were adjacent, very good properties; adjacent to some other companies, but I don't recall the names offhand.

Q. Do you recall what the stock was selling for? A. I believe it was 50 cents a share.

Q. And why did you leave there? A. I was selling very, very little of it, and I wasn't making a living.

Q. There was no knowledge that you gained about the way the operation was being conducted? A. No, I know nothing about the operations at all.

Q. Was Randex Uranium being produced at the time you were selling it, selling the stock? A. I don't recall.

Q. Do you know if Randex Uranium is still in business? A. I don't really know.

Q. Do you know if Brown, Barton & Engel are still in business? A. I believe they were a year ago. I don't know if they are still in business today or not.

Q. And after working for Brown, Barton & Engel two or three weeks where did you go to work? [3416] A. I believe it was Golden, Dorsth in New York City.

Q. Will you tell us is that an exchange house, or an over the counter house? A. No, that was also an over-the-counter house.

*Excerpts from Cross-Examination of Petitioner*

Q. Was there any one particular security that they were selling at that time? A. No.

Q. Not one particular security? A. No, they had a few securities there.

Q. When you say that they had a few securities there, do you mean less than six? A. I think less than six.

Q. Did they have more than one at any time? A. Yes.

Q. Did they have more than three at any time? A. That I couldn't exactly recall.

Q. Do you recall what securities you were selling? A. I think there was one called American States Oil and South—South something, a racing stock, but I can't recall the name of it.

Q American States Oil, was that producing oil when you were selling it? [3417] A. I don't recall that either.

Q. Do you recall what price it was selling at? A. No.

Q. Were you selling it over the telephone? A. Yes.

Q. Did you think that it looked like a good speculation? A. Yes.

Q. And is that what you told your customers? A. Yes.

Q. Do you know if they have government business? A. I don't know.

Q. How about this racing stock? Do you remember what that was selling at? A. No, I don't.

Q. Were you selling that over the telephone? A. Yes.

Q. Did you think that was a good speculation? A. Yes, I did.

Q. Did you tell your customers that you thought so? A. Yes.

Q. This was based on the literature, you say? A. Absolutely.

*Excerpts from Cross-Examination of Petitioner*

[3418] Q. Do you know if that is still in business? A. I don't know. I haven't followed that.

Q. Do you know if Golden, Dersth is still in business? A. I don't know.

Q. How long were you with Golden, Dersth? A. I think about five weeks.

Q. Why did you leave there? A. Also wasn't making a living there.

Q. And what did you do next? A. I went—I had a vending machine business that I had been in before I was in the securities deals, and every once in a while I would see customers in the vending machine business, and I may have done that in between there, or in between the next employment that I had with the securities people, but I don't recall.

Q. You say you had a vending machine business? A. Yes.

Q. Did you own it? A. No, I was a distributor.

Q. Did you distribute the machines or the products? A. The machines and the products.

Q. And the products? A. Yes.

[3419] Q. And in between Golden, Dersth and the next employment that you had in the securities business you say you went back into the vending machine business? A. Very possibly.

Q. Do you recall how long you were back in the vending machine business? A. No, I don't.

Q. Do you recall when you next went back to the securities business? A. I don't recall the date.

Q. Do you remember the year? A. I believe it was in the same year, 1956, I think.

*Excerpts from Cross-Examination of Petitioner*

Q. Could it have been 1955? A. Yes, it could have been 1955.

Q. Do you remember the firm that you were with? A. I believe Rothschild.

Q. G. F. Rothschild or L. F. Rothschild? A. G. F. Rothschild.

Q. Did you ever work for M. J. Schuck? A. Yes, I did.

Q. Did you work for them before Rothschild or after? A. I think it must have been before.

Q. And how long were you with Schuck? [3420] A. A very short period of time also.

Q. A number of weeks? A. Yes, a few weeks.

Q. Was this an exchange house? A. No, sir.

Q. An over-the-counter house? A. Yes, sir.

Q. Were you selling by telephone? A. Yes, sir.

Q. What were you selling? A. I don't recall that.

Q. Great Sweetgrass? A. Yes, sir.

Q. Did that look like an interesting speculation? A. Yes, it did.

Q. And did you tell that to your customers? A. Yes, sir.

Q. And you sold that, did you not? A. Yes.

Q. Is Great Sweetgrass still in business? A. They were in business.

Q. Are they in business today? A. I believe they are.

Q. How about M. J. Schuck? Is that firm in [3421] business? A. I don't know.

Q. You don't know? A. I don't know.

Q. You really don't know? A. No, sir.

Mr. Berman: Your Honor, I object to the form of that question.

The Court: Objection overruled.

*Excerpts from Cross-Examination of Petitioner*

Q. Do you know M. J. Schuck? A. No, I don't believe I met him.

Q. Do you know Milton Schuck? A. No, sir.

Q. Do you know any of the people that you worked with at Schuck? A. Yes, sir.

Q. Who is that? A. There was a man there, a Mr. Fisher.

Q. A Mr. Fisher? A. Fisher

Q. Is he a salesman, too? A. Yes.

Q. What was his first name? A. Bill, William.

[3422] Q. When was the last time you saw him? A. About six months ago.

Q. Did you on that occasion discuss M. J. Schuck by any chance? A. No, sir.

Q. Why did you leave Schuck? A. I don't recall exactly. I believe that a physician [sic] opened up with G. F. Rothschild at that time.

Q. Selling Great Sweetgrass? A. No, a sales position.

Q. That is what you were doing at the time? A. Yes.

Q. Were you going to get better pay at Rothschild? A. I don't remember what the various commissions were, but I thought there may be a chance to earn more money.

Q. But you were working for Schuck? A. Yes.

Q. Selling Great Sweetgrass? A. Yes.

Q. And presumably you were earning a commission? A. Yes.

Q. What was the commission? A. I don't recall exactly.

[3423] Q. You can't recall exactly why you left there to go to Rothschild, is that it? A. Well, I think it was, as I stated, that G. F. Rothschild had a position open at that time, and I had met Mr. Rothschild somewhere through Brown, Barton & Engel, and I remember when

*Excerpts from Cross-Examination of Petitioner*

I was with them, working for them, that I met Mr. Rothschild.

Q. Was a position opened up for you at Rothschild for a salesman? A. Yes.

Q. Which is what you were at Schuck? A. Right.

Q. So then you went to work for Rothschild? A. Yes.

Q. What did you sell at Rothschild, while you were at Rothschild? A. Great Sweetgrass, Kroy Oil, United Dye & Chemical.

Q. And when you went to work for Rothschild did you still tell your customers that Great Sweetgrass was a good speculation? A. Yes, and it looked even better at that time.

Q. And you told your customers that you thought Great Sweetgrass was a good speculation? [3424] A. I said it looked to me like a good speculation.

Q. And you sold it over the telephone? A. Yes.

Q. Did you think that the price was going to go up? A. Did I think that the price was going to go up?

Q. That is the question. A. Yes, I did.

Q. And did you tell your customers that? A. Yes.

Q. And Kroy Oil that you were selling for Rothschild A. Yes.

Q. did that look like an interesting speculation? A. Yes, it did.

Q. And did you tell that to your customers? A. You mean that it looked like an interesting speculation?

Q. Yes. A. Yes, I did.

Q. And did you think that the price was going to go up? A. Did I think that the price was going to go up?

Q. Did you tell your customers that you thought [3425]

that the price was going to go up? A. I thought that it was going to go up.

Q. And you told your customers that? A. Yes.

Q. How about United Dye & Chemical? A. What?

Q. Did that look like an interesting speculation? A. Yes.

Q. And did you tell your customers that you thought so? A. Yes.

Q. How long did you stay with Rothschild? A. Approximately six months.

Q. Incidentally, is Rothschild still in business? A. I believe Mr. Rothschild died. I don't know if the company is still in business or not.

Q. You don't know? A. No.

Q. You say you were with Rothschild approximately six months? A. Yes, sir.

Q. Why did you leave Rothschild? A. I don't recall now why I left, but there was an SEC investigation that had started and I didn't like [3429] the looks of the whole thing at that time. That was when I—that was when I saw that that I decided to leave.

Q. And where did you go then? A. I went back into the vending machine business. I went back into that business and I traveled around the country, and then went into California.

Q. How long did you stay in the vending machine business again? A. Well, that is hard to judge.

Q. A year? A. Possibly.

Q. With whom did you next go back into the securities business? A. I don't recall offhand.

Q. Did you ever work for any other securities firm after G. F. Rothschild? A. I believe I did, yes.

*Excerpts from Cross-Examination of Petitioner*

Q. One firm? A. No, a few firms.

Q. Two or three? A. Two or three, I would think, yes.

Q. Four or five? A. I don't know.

[3427] Q. Well, can you give us some of their names? A. Yes, there was a firm—a place Mack Robbins.

Q. What else? A. I don't know if that is the name or not. I think it was Robbins.

Q. All right, where else? A. Then there was this Newman, and then I was unemployed, and then I think there was Randall, Steven Randall.

Q. Any others? A. I believe that was.

Q. How about Keystone Securities? A. I don't recall.

Q. Can you think of any others? A. Not offhand, sir.

Q. Is Keystone still selling securities? A. I don't believe I worked for them.

Q. You don't believe your worked for Keystone Securities? A. I don't recall it.

Q. Steven Randall, is that an over the counter house? A. Yes.

Q. Were you selling by telephone? [3428] A. Yes.

Q. What were you selling? A. I really don't remember.

Q. Could it have been Swan Finch? A. No, sir.

Q. It couldn't? A. No, sir.

Q. Could it have been Doeskin Products? A. No, sir.

Q. Could it have been Havana Racing? A. I think there was a Havana Racing now that I recollect, and then I recollect another company. I believe it was American Dryer.

Q. American Dryer? A. Yes.

Q. How long did you stay with Steven Randall? A. Oh, about three months, I think, four months.

*Excerpts from Cross-Examination of Petitioner*

Q. Were you selling over the telephone? A. Yes.

Q. And the racing stock, did it look like a good speculation? A. Yes.

Q. And did you tell your customers that it looked like a good speculation? [3429] A. Yes.

Q. Did you think that the price was going to go up? A. From the reports that they had given me, yes, sir.

Q. Did you tell your customers that you thought the price was going to go up? A. Yes. I told them what was in the literature.

Q. Did it say in the literature or the reports that the price was going to go up? A. I don't remember what it said, but whatever I said, you know, it was in the literature.

Q. And if you said that the price was going to go up, you only would have said it because it was in the literature, is that right? A. (No answer.)

Q. I just want to understand you and make sure that I understand what you are saying, and that is all.

Mr. Berman: Your Honor, he is trying to put words in the witness's mouth.

The Court: The witness is being cross-examined, and Mr. Morrison wants to understand what the witness meant by his last answer.

Will you explain that?

[3430] A. To me from the reports that I was given the particular stock looked worthwhile, looked as if it had a chance to improve in value, as much as the whole market was improving in value at that time, and he is asking if I would tell my customers if I felt it had an opportunity to go up. It would be very difficult to tell them

otherwise, wouldn't it? A. Absolutely it would be very difficult to tell them otherwise, and I don't say that.

Q. But you don't say that, do you? A. I say it would be very difficult to sell them if you were to tell them that it was going to go down.

Q. And you wanted to sell the stock, didn't you? A. That is what I was doing.

Q. And you wanted to get these people to buy the stock from you? A. Yes.

Q. Right. And you could not do that if you told them that the price was going to go down, could you?

Mr. Berman: I object to that, your Honor, what this fellow said or the other fellow said that he could not tell them. That is not evidence in this case.

The Court: He may ask that question. [3431] This is cross-examination.

Q. Could you tell them the price was going to go down? A. No.

Q. You couldn't make sales, could you, if you told them that? A. I don't believe so.

Q. Could you make sales if you told them that you thought the price would stay about where it was? A. Possibly.

Q. So when you said the price was going to go up on each and every one of these stocks you actually believed it, did you? A. Yes.

Q. A hundred per cent believed it? A. Yes.

Q. No question in your mind about that? A. No.

Q. How about this American Dryer? Did you sell that over the telephone, too? A. Yes.

*Excerpts from Cross-Examination of Petitioner*

Q. And you had sold that from literature also? A. Yes.

Q. Did that look like an interesting speculation? [3432] A. Yes, sir.

Q. Did you tell that to your customers? A. Yes.

Q. Did you think that the price was going to go up? A. Yes.

Q. Did you tell it to your customers? A. Yes.

Q. Why did you leave Steven Randall? A. I don't recall at this time; possibly another position opened up, or some of these houses may have taken a position on a particular security and they had no position open at the time, and there was no work for a while.

Q. Do you remember the name of the next brokerage concern that you worked for? A. No, sir, not now, no, sir.

Q. Is Steven Randall still in business, do you know? A. I don't believe so.

Q. Is American Dryer still in business? A. I believe they are but I am not sure.

Q. I won't ask you about Swan-Finch now.

Mr. Berman: I don't understand that comment, [3433] your Honor.

The Court: Evidently you have not read the newspapers.

Mr. Berman: No, I have not.

The Court: Perhaps it is just as well, then.

Mr. Berman: All right, your Honor, excuse me.

Q. You said you went to work for Mack Robbins at one time, is that correct? A. Yes.

Q. What kind of a house was that? Was that an exchange firm. A. No, an over-the-counter firm.

*Excerpts from Cross-Examination of Petitioner*

Q. Selling any particular stock at Mack Robbins? A. The stock was a Sports Arena.

Q. Was that an over-the-counter stock? A. Yes.

Q. Did you sell that over the telephone? A. Yes.

Q. Did that look like an interesting speculation? A. Absolutely, sir.

Q. Did you tell your customers that? A. Yes.

Q. Did you think that the price was going to go up? [3434] A. Yes.

Q. And did you tell your customers that you thought the price was going to go up? A. Yes, sir.

Q. Why did you leave Mack Robbins? A. There was also an investigation there and I was getting pretty tired of getting located or working for a place, a company that was being investigated. I never realized that it was a common practice to investigate all of these replacements, and so I left there also.

Q. Are they still in business? A. I don't know.

Q. You don't know? A. No, I don't know, sir.

Q. Any other brokerage concern that you recall working for? A. Not offhand.

Q. If you think of one will you mention it? A. Yes, sir.

Q. I will ask you again about that. A. Yes."

* * *

[3512] Q. You said yesterday that when you were at Brown, Barton & Engel, you were selling Randex Uranium, is that correct? A. Yes, sir.

Mr. Berman: If your Honor please, I would like to repeat my original objection to this line of examination.

The Court: Overruled.

*Excerpts from Cross-Examination of Petitioner*

Q. Was that traded over the counter? A. I believe it was. I don't know if it still is or not.

Q. Did you ever tell your customer that this stock was going to be listed on any Exchange? A. No, sir.

Q. When you sold American States Oil, did you ever tell any of your customers that it was going to be [3513] listed? A. No, sir.

Q. When you sold the Racine stock that you sold at Golden Dersth, did you tell any of your customers that that stock was going to be listed? A. No.

Q. When you sold American Flyer with Steven Randall & Company, did you tell any of your customers that that stock was going to be listed? A. No.

Q. When you sold Havana Racing, when you worked with Steven Randall, did you tell any of your customers that that stock was going to be listed? A. No.

Q. When you sold Sports Arena did you tell any of your customers that that stock was going to be listed? A. No.

Q. What stock were you selling when you were with Philip Newman?

Mr. Berman: Your Honor, I object to this question again.

The Court: Objection is overruled.

A. Monarch Asbestos.

Q. Was that a listed stock? [3514] A. No, sir.

Q. Did you ever tell any of your customers that that stock was going to be listed? A. No, sir."

* * *

[3521] Q. Mr. Ross, do you know what a boiler room is? A. Yes.

*Excerpts from Cross-Examination of Petitioner*

Q. Will you tell the Court and jury what a boiler room is? A. A place where they sell stock on the telephone which generally it is 10, 15, 20 men, as I understand it, in one room.

Q. Is Kimball Securities a boiler room? A. Not in my estimation.

Q. Was Brown, Barton & Engel a boiler room? A. It didn't seem that.

Q. It was not a boiler room, are you sure? A. It seemed an over-the-counter house.

Q. Was M. J. Shuck a boiler room? [3522] A. It didn't seem that way either.

Q. Was G. F. Rothschild a boiler room? A. No.

Q. Was Keystone Securities a boiler room? A. Keystone Securities, I don't recall. I don't even remember the name.

Q. Was Steven Randall a boiler room? A. I wouldn't say that either.

Q. Is Mack Robbins a boiler room? A. No, sir.

Q. Is Philip Newman Associates a boiler room? A. No, I don't think so.

Mr. Berman: Your Honor, I would like the record once more to note my objection to this entire line.

The Court: Your objection is overruled.

Mr. Berman: Let the record note I am taking an exception.

The Court: Objection is overruled.

## Appendix D

EXCERPTS FROM TESTIMONY

Excerpt from Direct Examination of JOSEPH KELLY.

[3272] * * * A. Well, I obtained the numbers that were assigned to the various salesmen working for Kimball Securities.

I requested the cashier of Kimball's to identify the numbers that the salesmen used.

Mr. Berman: Your Honor, I would like to object to this answer and to any further questions along this line. I would like to object to these statements as being hearsay.

The Court: He is not giving any statement. He said he inquired of somebody as to the numbers that the salesmen used.

Q. Who was the cashier? A. Joseph Sussman.

Q. And did you obtain the numbers from him? A. He didn't give me the numbers, but he pointed to a list that was on the side of the cage, the cashier's cage, and it showed the numbers and the salesmen who was assigned to that particular number on the list.

Q. Will you tell us do you recall the list that you saw at that time? A. Yes, I do.

[3273] Q. Can you tell the Court and jury what was on the list?

Mr. Berman: I object to that, if your Honor pleases.

The Court: On what ground?

Mr. Berman: On the ground that the list is the best evidence, and it will speak for itself, and the proper foundation has not been laid to indicate whether the list was valid or a legitimate list, whether the list was in fact a part of the broker's business or the business of the salesmen.

*Excerpt from Direct Examination of Joseph Kelly*

The Court: Have you got that list or was it left there?

The Witness: It was left there, but I took down information including the names and the numbers.

The Court: That list was visible in the cashier's cage?

The Witness: That is correct, your Honor.

The Court: I think that is sufficient to lay the foundation.

Mr. Berman: Your Honor, the government had ample opportunity to ask the bookkeeper for all the information about the numbers, but did not do it.

[3274] The Court: That is true, but I will allow this.

Q. Mr. Kelly, will you tell the Court and jury what was on that list? A. Well, number 10 was assigned to Aekman.

Number 17 was assigned to Levey.

Number 19 was assigned to Kaplan.

Number 23 was assigned to Hixon.

Number 24 was assigned to Ross.

Number 26 was assigned to Clarke.

And number 30 was assigned to Gould.

Q. On what date were you on the premises of Kimball Securities in this regard? A. The first week in January, 1959.

Q. Was the defendant Paul Gordon's name on that list? A. No, it was not.

Q. So you don't know what number he had, do you? A. No, I did not.

# Appendix E

1 CONFIRMATION

KIMBALL SECURITIES, INC.
40 EXCHANGE PLACE
NEW YORK 5, N. Y.
DIGBY 4-9796

Date 11/26/58
Settlement Date 12/2/58
Salesman 21

☐ We confirm SALE today by us through you as our broker, of
☒ As principals and for our account, we confirm SALE to you today, of
☐ *On your instructions and as broker for you, we have this day BOUGHT for your account and risk.
☐ *On your instructions and as broker for you, we have this day BOUGHT for your account and risk. In this transaction, we have also acted as broker for another from whom we are to receive $_____ commission.
☐ As broker for another, we confirm SALE to you today of the above.

| QUANTITY | DESCRIPTION | PRICE | AMOUNT | COMM. | STATE TAX | FED. TAX | NET AMOUNT |
|---|---|---|---|---|---|---|---|
| 100 | Mark, Inc. | 2.35 | 235.00 | | | | 235.00 |

William S. Mueller
128 E. Pleasant St.
Amherst, Mass.

W. S. M.

VERY TRULY YOURS,

By _____

*The name of the seller of this security and the time when the transaction took place will be furnished upon request.

GOVERNMENT'S

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
OCT 30 1962

# Appendix F

RECORD UPON WHICH ORDER WAS MADE CORRECTING STENOGRAPHER'S TRANSCRIPT

## Order Appealed From

ENDORSEMENT [to motion papers filed March 26, 1963]

[SAME TITLE]

[3666] This motion to correct the record in the above case has been referred to me by Judge Croake by an order dated April 5, 1963. I have examined the motion papers and the extracts from the transcript of testimony. As the trial judge in this case I have a fairly good recollection of what was said in the course of the trial.

Apparently, from the motion papers, it appears that the transcript of the trial certified to the Court of Appeals recites at one place that the Government counsel said:

> "Q. I won't ask you about Swan-Finch now.
>
> Mr. Berman: I don't understand that comment, your Honor.
>
> The Court: Evidently you have not read the newspapers.
>
> Mr. Berman: No, I have not."

The Government counsel contends that Swan-Finch was not used in his comment; that he used instead "Havana Racing," which was the name of a stock which previously had been sold by the defendant. The affidavit of the court reporter attached to the motion papers indicates that his notes do not clearly indicate the exact remarks made by Government counsel, but he is certain they do not contain any reference to Swan-Finch at this particular point.

I have a distinct recollection that the reference was not to Swan-Finch but to Havana Racing. The Court's com-

ment at the time to defense counsel that "evidently you have not read the newspapers" related to the fact that the Cuban crisis was such that anybody acquainted with the newspapers would know that Havana Racing was not a going concern. I did not have sufficient acquaintance with Swan Finch to know whether any reference to the newspapers would have been appropriate or not. I do not know what was in the newspapers about Swan-Finch.

The motion of the Government to correct the record by substituting, "Havana Racing" for "Swan-Finch" at the place indicated is granted. So ordered.

s/ ARCHIE O. DAWSON
U. S. D. J.

Dated: April 9, 1963

## Memorandum

[3681] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

CROAKE, District Judge

MEMORANDUM

The United States moves pursuant to Rule 39(b)(1) of the Federal Rules of Criminal Procedure, and Rule 75(h) of the Federal Rules of Civil Procedure, for an order to correct the record herein as certified to the United States Court of Appeals for the Second Circuit.

Movant urges the court to refer this matter to the Hon. Archie O. Dawson, United States District Judge, before whom the case was tried. Defendants resist this suggestion on the ground that Judge Dawson would be a principal witness at a hearing to determine whether the record should be corrected.

Rule 39(b)(1) of the Criminal Rules provides in general that practice governing civil actions as to records [3682] on appeal apply to criminal appeals. Rule 75(h) of the Civil Rules provides, in part, that: "* * * if any difficulty arises as to whether the record truly discloses what occurred in the district court, the difficulty shall be submitted to and settled by that court and the record made to conform to the truth."

The words "district court" have been interpreted to mean the judge who presided at the trial, and this interpretation has been made both in civil and criminal cases. *Century Indemnity Co.* v. *Arnold*, 153 F. 2d 531 (2d Cir.

1946), *cert. denied*, 328 U. S. 854. *Camps* v. *New York City Transit Authority*, 261 F. 2d 320 (8th Cir. 1958), *Cox* v. *United States*, 284 F. 2d 704 (2d Cir. 1960), *cert. denied*, 365 U. S. 863 (1961).

Accordingly, the Government's request that the motion be referred to Hon. Archie O. Dawson is granted.

Dated: New York, New York
April 5, 1963

s/ THOMAS F. CROAKE
Thomas F. Croake
U. S. D. J.

## Affidavit of Peter H. Morrison, Esq.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

[3659] STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:
SOUTHERN DISTRICT OF NEW YORK

PETER H. MORRISON, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York, and as such, make this affidavit in support of the motion by the United States pursuant to Rule 75(h) of the Federal Rules of Civil Procedure to correct the transcript of the record on appeal in this matter.

2. On October 29, 1962, the trial of the defendants Howard Ross and Paul Gordon began before the Honorable Archie O. Dawson and a jury on a charge of fraud in the sale of securities involving the use of the mails in violation of Section 17(a) of the Securities Act of 1933, 15 U. S. C. 77q(a).

3. On November 2, 1962, the defendants Howard Ross and Paul Gordon were found guilty by a jury on counts ten and three, respectively, of the indictment herein. On December 5, 1962, the defendant Ross was sentenced to a term of one year and judgment was duly entered. On that same day, the defendant Ross filed a notice of appeal and [3660] on January 15, 1963, the transcript of the record of the proceedings below was filed in this Court. On Feb-

ruary 14, 1963, the Clerk of this Court filed notice that the record on appeal had been certified to the United States Court of Appeals for the Second Circuit.

4. At the trial, the defendant Ross testified in his own behalf, and during the course of his cross-examination, he was asked about his prior experience in the sale of securities. At page 3427 of the transcript on appeal, Ross testified that he worked for Steven Randall. On the following page, 3428, he denied that he sold either Swan-Finch or Doeskin Products stock while at Steven Randall, but said he believed he sold stock of Havana Racing and American Dryer. Ross was then asked about statements made by him with respect to Havana Racing and American Dryer.

5. The transcript certified to the Court of Appeals then recites as follows (page 3432):

"Q. Is Steven Randall still in business, do you know?

A. I don't believe so.

Q. Is American Dryer still in business?

A. I believe they are but I am not sure.

Q. I won't ask you about *Swan-Finch* now.

Mr. Berman: I don't understand that comment, your Honor.

The Court: Evidently you have not read the newspapers.

Mr. Berman: No, I have not.

[3661] The Court: Perhaps it is just as well, then.

Mr. Berman: All right, your Honor, excuse me.

Q. You said you went to work for Mack Robbins at one time, is that correct?" (Emphasis Added).

6. It is my recollection that I did not make the statement which is underscored. My best recollection is that the statement made was as follows:

"I won't ask you about Havana Racing now."

7. Ross had previously testified that he had not sold Swan-Finch at Steven Randall but that he had sold Havana Racing (Tr. 3428). My statement to him with respect to Havana Racing was in line with questions just preceding in which Ross was asked if Steven Randall and American Dryer were still in business. Because of the Cuban Revolution, Ross could not have been expected to answer a similar question with respect to Havana Racing. Hence, my statement to him.

8. Similarly, it is my belief that the response of the Court to the comment by Ross' counsel was a reflection of the then current newspaper coverage of the Cuban crisis.

9. On information and belief, the Court Reporter who transcribed the testimony in question, Maurice Flynn, has examined his notes and is uncertain as to the exact words in my statement to Ross, but is certain that they contain no reference to Swan-Finch.

WHEREFORE, it is respectfully submitted that the statement on page 3432 of the transcript certified as the record on appeal, to wit, "I won't ask you about Swan-Finch now", be corrected to read "I won't ask you about Havana Racing now", and that a corrected copy of page 3432 be [3662] certified to the Court of Appeals for the Second Circuit.

s/

PETER H. MORRISON
Assistant United States Attorney

(Sworn to March 25, 1963)

## Affidavit of Mr. Maurice D. Flynn

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

[3663] STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

MAURICE D. FLYNN, being duly sworn, deposes and says:

1. I am one of the Southern District of New York Court Reporters.

2. On October 31, 1962, I was assigned to the trial of United States v. Howard Ross and Paul Gordon being tried before the Honorable Archie O. Dawson and a jury.

3. At the request of Thomas J. Cahill, Esq., Assistant United States Attorney for the Southern District of New York, I have examined the notes taken by me during the cross-examination of the defendant Howard Ross, with particular reference to the statement made by Peter H. Morrison, Esq. to Ross, transcribed in the record certified to the Court of Appeals as: "I won't ask you about Swan-Finch now" (Tr. 3432).

4. My notes do not clearly indicate the exact remarks made by Mr. Morrison at that point in the trial. I am certain, however, that they do not contain any reference to Swan-Finch at this particular point.

[3664] 5. I do not know how or why the words Swan-Finch were transcribed as a part of Mr. Morrison's statement on page 3432.

s MAURICE D. FLYNN

(Sworn to March 25, 1963.)

## Affidavit of Ira W. Berman, Esq.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

[3674] STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

IRA W. BERMAN, being duly sworn, deposes and says:

That he is an attorney and was trial counsel to Howard Ross when the case was tried in the United States District Court before the Honorable Judge Dawson.

The defendant appealed the case to the United States Court of Appeals and retained Gallop, Climenko & Gould to handle his appeal. I had two or three telephone conversations with Mr. Alan J. Hartnick of the Gould firm, with whom I discussed the case, and other than that no further contact with the appellant.

A few weeks ago Mr. Hartnick mailed me the appellant's appendix and the appellant's brief and asked for any comment that I might have on his presentation. The following morning Peter Morrison, the Assistant United States Attorney who tried the case for the government, called and asked if I had read the appendix. I replied in the affirmative. He then asked whether I recalled the testimony that took place on page 20A of the appendix, namely,

"A. I won't ask you about Swan Finch now.

Mr. Berman: I don't understand that comment, (3383) your Honor.

The Court: Evidently you have not read the newspaper.

[3675] Mr. Berman: No, I have not.

The Court: Perhaps it is just as well then.

Mr. Berman: All right, your Honor, excuse me."

I replied to Mr. Morrison that I very clearly recalled the exact incident. He stated to me that he wasn't quite sure that he had stated Swan-Finch, that he thought it might be Havana Racing and that he really meant Havana Racing. He further advised me that he had checked with a court reporter who had advised him that he was not certain that it was Swan-Finch or not Swan-Finch that was stated at that time, that his records were not clear. Mr. Morrison then asked me whether I had ever been asked by the court reported for information to help clarify what the reporter might have missed in the transcript and I replied in the negative.

Why that particular little incident appears so clear in my mind is due to the fact that I was retained by Jerard Re, Junior and Senior to defend a proceeding before the Securities & Exchange Commission concerning their expulsion from the American Stock Exchange. In the course of my investigation, I became quite familiar with the incidents and proceeding surrounding the Swan-Finch matter. Therefore, when Mr. Morrison asked the question or rather stated, "I won't ask you about Swan-Finch," I myself was curious to see where this particular defendant had anything to do with the Swan-Finch stock situation and, therefore, the incident remained very clearly in my mind. Furthermore, later that day I believe the defendant happened to ask me why I was so naive that I didn't know anything about Swan-Finch and I replied to him, "Howard, what I know about Swan-Finch could fill ten volumes. I want to know what the prosecutor knew about Swan-Finch and what it had to do with the case."

Such questions by the prosecutor in my opinion constituted prejudicial error and I had objections to such questions.

[3676] It is my recollection that Mr. Morrison mentioned Swan-Finch and that the court reporter correctly recorded this testimony in his transcript.

s/ IRA W. BERMAN

(Sworn to March 28, 1963.)

## Supplementary Affidavit of Peter H. Morrison, Esq.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

[3678] STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:
SOUTHERN DISTRICT OF NEW YORK

PETER H. MORRISON, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York.

2. I make this affidavit in support of the Government's motion for an order pursuant to Rule 75(h), Federal Rules of Civil Procedure, correcting the transcript of the Record on Appeal in this matter. The sole purpose of this affidavit is to respond to statements attributed to me by Ira W. Berman, in his affidavit sworn to March 28, 1963.

3. In his affidavit, Mr. Berman asserts that I stated to him that I wasn't quite sure that I had mentioned "Swan-Finch" in the statement in question at Page 3433 of the stenographic transcript. Mr. Berman states further that I advised him that I had checked with the court reporter who had advised me that he was certain that I had not mentioned Swan-Finch at that point in the transcript and that I had asked Mr. Berman if he had been asked by the court reporter [3679] for information to help clarify what the reporter might have missed in the transcript.

4. I never stated to Mr. Berman that I wasn't "quite sure" that I had stated "Swan-Finch" in the questioned part of the transcript. On the contrary, I made it clear to Mr. Berman that there was not the slighest question in my mind that I had not mentioned "Swan-Finch" and that, in fact, I had mentioned Havana Racing.

5. I did not advise Mr. Berman that I had checked with a court reporter, and, in fact, I have not to this day discussed this matter with the court reporter.

6. I did not ask Mr. Berman whether he had been in contact with the court reporter.

7. When I was apprised of the contents of Mr. Berman's affidavit, I asked him whether he had discussed this matter with any other Assistant United States Attorney and he stated that he had. I asked him whether the conversation relating to the court reporter that he thought he had with me was in fact had with another Assistant United States Attorney. Mr. Berman's reply to me was: "I'm almost sure, I'm sure, I'm 200% sure".

8. On the basis of papers submitted in connection with this motion, it is apparent that there is an issue of fact concerning the record as transcribed, and it is respectfully submitted that the Court should order a hearing held to resolve that issue.

/s/ PETER H. MORRISON
Peter H. Morrison
Assistant United States Attorney

(Sworn to April 2, 1963.)

# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 327

HOWARD ROSS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on July 5, 1963. The petition was filed on August 2, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether there was sufficient competent evidence to sustain the jury verdict.

2. Whether there was improper and prejudicial cross-examination of defendant which required reversal of his conviction.



699-709—63

3. Whether the transcript was improperly corrected pending appeal.

## STATEMENT

Petitioner was convicted, after trial by jury, of having unlawfully caused the mails to be used to send a confirmation of purchase of 100 shares of stock in Mark, Inc. to one William S. Mueller in pursuance of a scheme and artifice to defraud, in violation of 15 U.S.C. 77q(a) and 77x. He was sentenced to imprisonment for one year.[1]

Petitioner was employed as a telephone salesman by Kimball Securities, Inc., a "boiler room operation" (R. 2952–2953)[2] which sold shares only in Mark, Inc., its predecessor and successor (R. 2955, 2957, 3231). Kimball's method of sale was to purchase mailing lists and send out "teasers", *i.e.*, descriptive literature intended to arouse the recipient's interest (R. 2959–2960). Those who responded were then called by the telephone salesmen who attempted to make sales of the stock (R. 2964). There were two types of salesmen: the "opener," who made the initial sale, and the "loader," who, after more "teaser" literature was sent, attempted to increase the sales to each buyer (R. 2965). Petitioner was employed as an "opener."

The salesmen, who needed no training because they had all worked elsewhere (R. 2971), received as

[1] Two other counts, one charging another unlawful use of the mails and one charging a conspiracy, were dismissed by the court at the close of the Government's case (R. 3356, 3365).

[2] R. indicates the pencil numbering from the court of appeals record.

commission at first 10% and later 12% of their gross sales to customers (R. 2967, 3228, 3230). The commissions of each salesman were computed by assigning him a number, which was indicated on the confirmation slip sent to the purchaser (R. 2966, 3228). The bookkeeper kept a list of the salesmen's numbers, and received copies of the confirmation slips from which he computed commissions (R. 3229).

Mueller, the victim, testified that he was called at home by a person who "identified himself as a Mr. Ross representing Kimball Securities at New York City" (R. 3092),[3] and that because of the solicitation he bought 100 shares of Mark at $2.35 a share (R. 3096). He stated that his caller told him that Mark was a good speculation, that Kimball was a reliable company that had hired stock analysts to protect customers (R. 3094), and that he (the caller) would put all of the money he could obtain into the stock (R. 3095). In point of fact, Kimball had no research department and no analysts, and the salesmen were never told that the company had earnings and were never shown a profit and loss statement (R. 2976–2978). The confirmation slip that Mueller received indicated the salesman as number "24" (R. 3327).[4]

[3] An S.E.C. questionnaire signed by Mueller indicated that a Joe Kimball had made the initial call. The discrepancy was explained by Mueller and probed fully on cross-examination. Mueller reiterated that the name of his caller was Ross (R. 3099, 3115).

[4] A Walter A. Gairing also testified that he had bought stock in Mark on the basis of a call from a man who identified himself as "Ross" (R. 3317), and the confirmation slip that he received also contained the number "24" in the salesman's space (R. 3327). Telephone company records showed that a

Joseph A. Kelly, a Securities and Exchange Commission investigator, testified that he had asked the Kimball bookkeeper for the list of salesmen, and that the bookkeeper had pointed to a list at the side of the cashier's cage which showed the salesmen by name and number (R. 3272). He testified that petitioner's name was listed next to the number "24" (R. 3274). Kimball's books reflected both commissions to petitioner and the sale to Mueller (R. 3221–3222). During the Government's case, petitioner's attorney conceded that petitioner had worked as a salesman and received commissions, but did not concede that he had made the particular sale at issue (R. 3224–3226).

Petitioner himself testified that he worked for Kimball between November 14 and December 1, 1958 (the period during which the sale to Mueller had been made) and earned between $700 and $800 in commissions (R. 3389, 3391). He stated that he had made a number of telephone calls in connection with his work, but had no specific recollection of having placed the call to Mueller, saying that he might or might not have done it (R. 3387–3388).

The gist of petitioner's testimony was that he had acted in good faith, that when he commenced his employment he had been given literature concerning Mark and thought that it was a good company (R. 3381–3383). On cross-examination, he was questioned concerning his past employment with other dealers

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man named "Ross" had made a call to Gairing from the telephone number listed to Kimball on the day that Gairing said he received his call (R. 3307–3308).

which, like Kimball, had sold stocks in only one company by telephone, and was asked the present status of those dealers and the companies whose stock he had sold (R. 3410–3434, 3512–3514, 3521–3522). One of the questions on cross-examination was whether petitioner had sold stock in Swan-Finch, which he denied. He did admit selling stock in Havana Racing (R. 3424). Thereafter, in the course of questioning petitioner about whether various companies were still in business, the prosecuting attorney made a remark which the original transcript reflected as: "I won't ask you about Swan-Finch now." Petitioner's attorney made no objection nor request in connection with this remark, but merely stated: "I don't understand that comment, your Honor." The Court said, "Evidently you have not read the newspapers" (R. 3432–3433). Thereafter, the Government, contending that the transcript was in error, moved to correct it by substituting the words "Havana Racing" for "Swan-Finch." The motion was supported by the affidavits of the prosecuting attorney and court reporter (R. 3658–3665), and was answered by an affidavit (R. 3667–3677) that included the affidavit of petitioner's trial counsel (R. 3674–3676). The trial judge, upon the basis of his own recollection and the context provided by his own comments as shown in the transcript,[5] issued an order granting the Government's motion (R. 3666).

[5] The trial was conducted from October 29th to November 2, 1962.

ARGUMENT

1. Even without Investigator Kelly's testimony in regard to the list, there was sufficient evidence linking petitioner to the sale to Mueller to sustain the verdict of guilty. The evidence was clear that petitioner had made the type of call that Mueller received, and petitioner himself conceded that he could have made the call in question.[6] The number listed in the salesman identification space on the confirmation slip that Mueller received was the same number that was listed on the confirmation slip received by Gairing, who also testified that he was solicited by petitioner, and petitioner's call to Gairing was corroborated by telephone company records. Although further corroboration might have been necessary had the question at issue been the broad one of whether petitioner had any connection with the Kimball operation, the corroboration is sufficient where his connection was conceded and the question at issue was only the narrow one of whether he made the particular call. Compare *United States* v. *Fleming*, 134 F. 2d 776, 778 (C.A. 2, 1943); *Jarvis* v. *United States*, 90 F. 2d 243, 245 (C.A. 1, 1937), certiorari denied, 302 U.S. 705; *Andrews* v. *United States*, 78 F. 2d 274,

[6] The question is whether there was sufficient evidence at the close of the entire case, and not at the close of the government's case, since by putting on a defense petitioner abandoned the motion that he made at the close of the government's case. *T'Kach* v. *United States*, 242 F. 2d 937, 938 (C.A. 5, 1957); *Leeby* v. *United States*, 192 F. 2d 331, 333 (C.A. 8, 1951); *Gaunt* v. *United States*, 184 F. 2d 284, 290 (C.A. 1, 1959), certiorari denied, 340 U.S. 917; *Mosca* v. *United States*, 174 F. 2d 448, 450–451 (C.A. 9, 1949); *United States* v. *Goldstein*, 168 F. 2d 666, 669–670 (C.A. 2, 1948).

275 (C.A. 10, 1935); *Van Riper* v. *United States,* 13 F. 2d 961, 968 (C.A. 2, 1926), certiorari denied *sub nom. Ackerson* v. *United States,* 273 U.S. 702; *Robilio* v. *United States,* 291 Fed. 975, 982–983 (C.A. 6, 1923), certiorari denied, 263 U.S. 716; *Wallace* v. *United States,* 291 Fed. 972, 973 (C.A. 6, 1923). Since there was thus sufficient competent evidence to sustain the verdict, it is immaterial that incompetent evidence on the point may have been admitted as well. *Leeby* v. *United States, supra,* 192 F. 2d at 335; *Diehl* v. *United States,* 98 F. 2d 545, 548 (C.A. 8, 1938).

Moreover, it is not entirely clear that Kelly's testimony was incompetent. His testimony and that of the bookkeper indicated that he was testifying to personal observation of a record kept in the normal course of business for the purpose of computing the salesmen's commissions; the testimony was therefore within a well-established exception to the hearsay rule. Nor is the best evidence rule applicable, since that rule comes into play only when it is the *terms* of a document, and not merely the *information* that it contains, that must be proved. *United States* v. *White,* 223 F. 2d 674, 675 (C.A. 2, 1955), certiorari denied, 350 U.S. 888; *Meyers* v. *United States,* 171 F. 2d 800, 812 (C.A. D.C., 1948), certiorari denied, 336 U.S. 912; *Herzig* v. *Swift & Co.,* 146 F. 2d 444, 446 (C.A. 2, 1945); *Maier* v. *Publicker Commercial Alcohol Co.,* 62 F. Supp. 161, 167 (E.D. Pa., 1945), affirmed on the opinion of the district court, 154 F. 2d 1020 (C.A. 3, 1946); 4 Wigmore, *Evidence* (3d Ed. 1940) §§ 1174(1), 1181.

2. The main thrust of petitioner's defense was good faith, *i.e.*, that he relied on the descriptive literature concerning Mark as much as did the persons to whom he sold, and hence that he had no knowledge that the stock issue was fraudulent and no intent to defraud his customers. It was therefore proper for the government to explore, on cross-examination, his prior connections with similar ventures to show a continuing course of conduct on his part, and to demonstrate that he must, from his previous experience, have been aware of Kimball's and Mark's lack of bona fides. *Sachs* v. *United States*, 281 F. 2d 189 (C.A. 9, 1960), certiorari denied, 364 U.S. 909; *Morrison* v. *United States*, 270 F. 2d 1, 4–5 (C.A. 4, 1959), certiorari denied, 361 U.S. 894; *Kansas City Star Co.* v. *United States*, 240 F. 2d 643, 650 (C.A. 8, 1957), certiorari denied, 354 U.S. 923; *Moses* v. *United States*, 297 F. 2d 621, 623–624 (C.A. 8, 1961); *Tandberg-Hanssen* v. *United States*, 284 F. 2d 331, 333 (C.A. 10, 1960); *Ehrlich* v. *United States*, 238 F. 2d 481, 484 (C.A. 5, 1956).

3. As to the putative statement in regard to Swan-Finch, it is sufficient to point out that, even if made, standing by itself it could hardly be considered so prejudicial as to require a new trial. Petitioner neither entered an objection nor requested a mistrial or a cautionary instruction. Compare *Century Indemnity Co.* v. *Arnold*, 153 F. 2d 531, 533 (C.A. 2, 1946), certiorari denied, 328 U.S. 854. Moreover, the question of correcting the record was properly submitted to the judge who presided at the trial, *Cox* v. *United States*, 284 F. 2d 704, 710 (C.A. 8, 1960),

certiorari denied, 365 U.S. 863; *William Howard Hay Foundation* v. *Safety Harbor Sanatorium*, 141 F. 2d 952 (C.A. 5, 1944); *Belt* v. *Holton*, 197 F. 2d 579, 581 (C.A. D.C., 1952); *Century Indemnity Co.* v. *Arnold, supra*, and he could properly make the correction either on his own recollection, *Marron* v. *Atlantic Refining Co.*, 176 F. 2d 313, 315 (C.A. 3, 1949), certiorari denied, 339 U.S. 923, or, as here, on recollection and affidavits from the parties. See *Cox* v. *United States, supra; Boucher Inventions* v. *Sola Electric Co.*, 1 F.R.D. 631 (D. D.C. 1941). The trial judge's ruling is final and conclusive on appeal, *Cox* v. *United States, supra*, p. 711, in the absence of a charge that he deliberately and intentionally falsified the record. *Belt* v. *Holton, supra*, p. 582.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*

HERBERT J. MILLER, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
*Attorneys.*

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1963**

No. 327

HOWARD ROSS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE PETITIONER IN REPLY

JESSE CLIMENKO,
*Attorney for Petitioner,*
GALLOP CLIMENKO & GOULD,
360 Lexington Avenue,
New York, New York.

*Of Counsel:*
JESSE CLIMENKO,
MILTON S. GOULD,
SHELDON CAMHY.

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## BRIEF FOR THE PETITIONER IN REPLY

The following points are made in reply to respondent's brief in opposition to the Petition:

**With Respect to Respondent's Statement of the Facts:**

At page 4 of the respondent's brief, the following statement appears:

> "Kimball's books reflected both commissions to petitioner and the sale to Mueller" (R. 3221-3222).

This statement could be misleading. Kimball's books do not show that petitioner received a commission from the sale to Mueller nor do they in any other way connect petitioner with the sale or with Mueller. They merely show, in separate places, that petitioner was one of Kimball's many salesmen and that Mueller was one of its many customers.

**In Reply to Point 1 of Respondent's Argument:**

With respect to the Kelly testimony, the Government argues:

> "Since there was sufficient competent evidence to sustain the verdict it is immaterial that incompetent evidence on this point may have been admitted as well" *Leeby* v. *United States*, *supra*, 192 F. 2d at 335; *Diehl* v. *United States*, 98 F. 2d 545, 548 (C A 8, 1938).

The two cases cited by the respondent do not support its position. They make it clear that a criminal conviction may not rest upon incompetent evidence (such as the Kelly testimony) unless the other evidence supporting the conviction is "*abundant*" not merely "sufficient". In effect, the competent evidence must exist in such abundance as to exclude the possibility that the incompetent evidence was the persuasive factor in petitioner's conviction by the jury.

In the instant case the other evidence cited by respondent (p. 6) was neither abundant nor even sufficient. That petitioner worked for Kimball and made the "*type*" of call that Mueller received proved nothing. Kimball employed numerous salesmen who kept its telephones in constant use calling prospective customers. The alleged telephone call to Gairing was pure hearsay even as to Gairing and in addition was totally irrelevant as to Mueller in the absence of proof that petitioner was salesman number 24.

None of the cases cited by the Government on question of proof of telephone identity sustained a conviction based on such flimsy corroboration. In *United States* v. *Flemming*, 134 F. 2d, 776 (2nd Cir. 1943) the identity of the maker of a telephone call was corroborated by a return call. Such corroboration comes within a well established

rule and is to be sharply distinguished from the instant case where only one call was made, the alleged call which constituted the crime and there was no return call.

In *Jarvis* v. *United States*, 90 F. 2d 243 (1st Cir. 1937) the fact that a witness had repeatedly received sales literature from a particular securities firm prior to receiving a telephone call from a voice identifying himself as being with said firm, combined with the fact that no other firm was engaged in the sale of the securities in question, was held sufficient to prove that the call was made on behalf of the firm. It should be noted that the identity of the particular employee who called was not at issue.

Similarly, in *Van Riper* v. *United States*, F. 2d, 961 (2nd Cir. 1926) the fact that the firm in question was the only firm engaged in the sale of the securities taken together with the fact that the several telephone calls were made to and from the same office, was sufficient to identifying the firm as the source of the telephone calls, but the Court was very careful to point out:

> "Of course, this did not identify him [the telephone voice] *as the person whose name he gave;* indeed we may be substantially sure that he was *not* that person". (Emphasis added.)

The above observation is particularly applicable to the instant case, where it is not the firm but petitioner, one of its numerous employees, who is being charged with the crime of making the particular telephone call in question.

*Robilio* v. *United States*, 291 Fed. 985, and *Wallace* v. *United States*, 291 Fed. 972 (6th Cir., 1923), involved repeated telephone calls, return telephone calls and independent voice recognition. Accordingly, they cannot be considered authority for the Government's position herein where there was a single telephone call, no return calls and no voice recognition.

In *Andrews* v. *U. S.*, 78 F. 2d 274 (10th Cir. 1935) the telephone calls sought to be proved were corroborated by receipts and subsequent correspondence. In the instant case, no such written corroboration exists, unless petitioner is connected to the receipt issued Mueller by the incompetent Kelly testimony.

With respect to the admissibility of Kelly's testimony, respondent argues (p. 7) that

> "* * * it is not entirely clear that Kelly's testimony was incompetent. His testimony and that of the bookkeeper indicated that he was testifying to personal observation of a record kept in the ordinary course of business for the purpose of computing commissions;"

No record citation is given for this assertion. None can be given since there is no evidence that the list which Kelly said he saw was a record kept in the regular course of business. The absence of such evidence is doubly significant when it is considered that Kimball's bookkeeper, Mr. Sussman, and the books and records of the Kimball company were in Court.

The distinction drawn by respondent (p. 7) with respect to the best evidence rule between the "terms" of an instrument and the "information" it contains is neither clear nor supported by the cases cited. These cases hold merely that statements or events may be proved by the testimony of witnesses having direct knowledge thereof as well as by documents in which they may be recorded. Thus, in *United States* v. *White*, 223 F. 2d 674 (2d Cir. 1955) the Court permitted oral testimony as to defendant's confession when a wire recording thereof had been made. The theory of this decision was that the issue was not the content of the wire recording but what statements defendant in fact had made in his confession. Upon the

same theory, in *Meyers* v. *United States*, 171 F. 2d 800, 813 (D.C. Cir. 1948) testimony was admitted as to defendant's statements before a congressional committee, although a stenographic transcript of said proceedings was in existence. In a civil case, *Herzig* v. *Swift*, 146 F. 2d 444 (2d Cir. 1945) testimony was permitted as to the earnings of a partnership where the same were known to the witness although said earnings were also reflected in the partnership's books and records. A similar holding is *Malir* v. *Pulidicker Commercial Alcohol Co.*, 62 F. Supp. 161 (ED Pa. 1945) holding that a witness may testify as to his knowledge of wages paid an employee although said wages are also reflected in books and records.

None of the foregoing decisions apply. Here, Kelly had no knowledge of the salesmens' numbers except as shown on the alleged list. His testimony had to be of the content of the list. Indeed, the Court's disregard of the hearsay rule as to Kelly's testimony turns upon the essential (albeit erroneous) premise that such testimony constituted nothing more than the introduction of the list as a business record. Accordingly, the best evidence rule was clearly applicable.

Had Sussman, the bookkeeper, testified that petitioner was salesman number 24 either from his personal knowledge or by producing the list or had he even testified as to the authenticity of the list which Kelly said he saw, some merit might attach to the identification of petitioner as salesman number 24. But, although Sussman testified, he carefully did not speak on this issue, thereby giving the Kelly testimony a strange and hollow ring. As the record now stands, no person has sworn that he personally knew either that petitioner was salesman number 24 or that the records of the Kimball Company, duly kept and maintained, showed petitioner so to be. Yet it is on this fact that petitioner's conviction rests.

**In Reply to Point 2 of Respondent's Argument:**

Respondent's justification of the improper cross examination and the cases cited in support thereof, ignores the chief vice of the technique employed by the Government in cross examining petitioner. Assuming that it was proper to show a "course of conduct" in order to negate good faith, actual proof of such prior misconduct is required for this purpose. In each of the cases cited by respondent on page 8 of its brief; prior illegal acts were proven. In the instant case, there was no such proof. Instead, the prosecutor merely insinuated and suggested numerous prior crimes in connection with the sale of securities and then placed upon petitioner the burden of disproving all of these insinuations. This is directly opposed to the presumption of innocence which is supposed to prevail in our system of criminal justice.

**In Reply to Point 3 of Respondent's Argument:**

The Government argues that the "Swan-Finch" reference was not prejudicial and should be ignored because petitioner's trial counsel failed to object to it. As can be seen from the transcript in its original form, petitioner's counsel was confused by the reference, and advised the Court that he did not understand it. The trial judge took great pains not to enlighten him. Under the circumstances, we submit, counsel's failure to object is understandable.

None of the cases cited by respondent in support of the correction of the record, involved the striking of words appearing in a stenographic transcript and the substitution of other words to reflect the recollection of the judge and of the prosecutor. Each case cited by Respondent involved a situation where there was no stenographic transcript or

its content was ambiguous or an omission therefrom was alleged. It is submitted that the situation is entirely different where prejudicial remarks of prosecuting attorney are deleted from a transcript by the trial judge upon the application of the prosecutor after said remarks have been assigned as error on appeal.

Finally, we note the tendency of respondent to argue that each error was not *of itself* prejudicial. It is submitted that in view of the absence of any other corroborative evidence, the admission of the Kelly testimony was critical; that in the light of the lack of competent evidence of guilt of the crime charged in the indictment, the unproved insinuation of other crimes was poisonously effective, and that in the context of the criminal aura with which petitioner was unfairly painted by the prosecution, the suggestion that he was also implicated in the notorious Swan-Finch scandal sealed his fate with the jury. The cumulative effect of these errors renders the conviction unsupportable.

**For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.**

JESSE CLIMENKO,
*Counsel for Petitioner;*
GALLOP CLIMENKO & GOULD.

JESSE CLIMENKO,
MILTON S. GOULD,
SHELDON CAMBY,
*Of Counsel.*